S. Hrg. 99-1005

PRODUCT LIABILITY REFORM ACT

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2760

A BILL TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

SEPTEMBER 9 AND 10, 1986

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PRODUCT LIABILITY REFORM ACT—S. 2760

TUESDAY, SEPTEMBER 9, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch presiding.

Present: Senators Grassley, Specter, McConnell, Broyhill, Biden, Metzenbaum, Heflin, and Simon.

Staff present: Laurence R. Herman, chief counsel, Subcommittee on Courts; Christopher Dunn, minority counsel, Subcommittee on Juvenile Justice.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH [presiding]. If we could begin. The purpose of this hearing is to thoroughly examine the Product Liability Reform Act, S. 2760, which was favorably reported by the Senate Committee on Commerce, Science, and Transportation, and will soon be debated in the full Senate.

Proponents of the bill point to the costly, slow, inequitable, and unpredictable nature of the current product liability system. Extensive hearings have been held in the Commerce Committee on the problems facing business and consumers relating to product liability, and in the Judiciary Committee, on the issue of tort liability, generally.

Prior hearings have focused on the many consumers who are injured by defective products, and who are unable to recover damages or must wait years, by necessity, for recovery.

Not only does the present product liability system generate excessive transaction costs, but it also fails to fairly compensate injured victims in proportion to their actual economic losses.

Moreover, the inefficiency, and unpredictability of the product liability system is cited as a cause of the insurance availability and affordability crisis facing many companies today, whether they produce vaccines, medical devices, textile manufacturing equipment, sporting goods, machine tools, et cetera.

Therefore, with the benefit of testimony from prior hearings, and an awareness that the present product liability system adversely impacts both plaintiffs and defendants, as well as manufacturers, product sellers, and consumers, we turn to a careful examination of S. 2760. How will this bill affect the current product liability crisis? Is it adequate in its scope? Is its approach beneficial? Is a Federal solution necessary?

With these questions in mind, I look forward to the testimony of the distinguished witnesses who are here today and tomorrow.

Many people have felt that our current products liability system is outdated, outmoded, inefficient; that it does not work, and that both sides are very unhappy.

Frankly, there are many inequities that literally make it almost impossible to have fairness and justice result from this current system.

So the purpose of this hearing today is to look into these matters and see what can be done, and of course with particular interest on this bill.

So we will begin this morning with the distinguished Assistant Attorney General of the United States, Mr. Richard Willard. We welcome you to the committee, Mr. Willard, and look forward to taking your testimony at this time. Let me put in Senator Grassley's statement right now.

[Senator Grassley's statement and the text of S. 2760 follow:]

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Thank you Mr. Chairman. First let me commend the Chair for his determined effort to get this issue before the Committee. I welcome this opportunity to consider S. 2760, the Product Liability Reform Act, as reported by the Commerce Committee.

Although we don't have an official referral of the bill, we have an obligation to give the full Senate our views, before the Senate takes up this bill on the floor.

Few issues have so quickly become a national concern as that of liability insurance and product liability. This fact was demonstrated in the recent recommendations in the 1986 White House Conference on Small Business. At that conference, our Nation's entrepreneurs called civil justice and product liability reform their top priority. Specifically, the conference called for enactment of S. 2760, with amendments establishing fault-based defenses, and amendments to eliminate joint and several liability.

Since small business generates 70 percent of the new jobs in this country, I believe we have a duty to carefully consider the call of the 1,800 delegates at the White House Conference on Small Business.

I recognize this is a tough issue, and we are challenged to sort through the charges and counter-charges of who's to blame. Some facts are unassailable.

Nationally, the number of million-dollar jury awards in personal injury cases jumped from 27 in 1975 to 401 two years ago. And average jury awards have been increasing about 15 percent annually since 1975.

In Federal courts the number of product liability suits filed during the past 10 years rose 785 percent. In Iowa, the tide of civil cases rose nearly 50 percent between 1974 and 1985, though our State's population hardly grew at all.

The Des Moines Register recently reported that liability insurance premiums for Iowa companies have increased as much as 1,500 percent in the past year. Many businesses are charging more for their products; others are scrapping products and laying off workers.

The insurance policies of one-third of Iowa's nursery schools and day-care centers were either cancelled or not renewed last year. Insurance has all but dried up for Midwest farm fertilizer dealers. And Iowa's casualty insurance companies are doing no better—they lost $250 million in 1985. Two large firms were taken over and liquidated by the State, and a third one is in trouble.

More than 50 family doctors in Iowa have stopped delivering babies; 19 have stopped performing surgery due to high insurance costs. Others simply pass the cost on to their patients.

This issue has even invaded the innocent world of child's play. The Miracle Recreation Equipment Co. of Grinnell, Iowa, in the country's largest playground equipment manufacturer. It also is a defendant in some 70 lawsuits.

Mr. Chairman, no State is unaffected by this issue. I don't know that we can successfully untangle this spider's web of liability, but surely we must try.

X

Calendar No. 856

99TH CONGRESS
2D SESSION

S. 2760

[Report No. 99–422]

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 14 (legislative day, AUGUST 11), 1986

Mr. DANFORTH, from the Committee on Commerce, Science, and Transportation, reported the following original bill; which was read twice and placed on the calendar

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A BILL

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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TITLE I

SHORT TITLE

SEC. 101. This Act may be cited as the "Product Liability Reform Act".

DEFINITIONS

SEC. 102. (a) As used in this Act, the term—

(1) "claimant" means any person who brings a civil action pursuant to this Act, and any person on whose behalf such an action is brought; if such an action is brought through or on behalf of an estate, the term includes the claimant's decedent, or if it is brought through or on behalf of a minor or incompetent, the term includes the claimant's parent or guardian;

(2) "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy such standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt;

(3) "collateral benefits" means all benefits and advantages received or entitled to be received (regardless of any right any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien, or otherwise) by any claimant harmed by a product or by any other person as reimbursement of loss because of harm to person or property payable or required to be paid to the claimant, under—

(A) any Federal law or the laws of any State (other than through a claim for breach of an obligation or duty); or

(B) any life, health or accident insurance or plan, wage of salary continuation plan, or disability income or replacement service insurance or any benefit received or to be received as a result of participation in any pre-paid medical plan or Health Maintenance Organization;

(4) "commerce" means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of that State; or (B) which affects trade, traffic, commerce, or transportation described in clause (A);

(5) "commercial loss" means economic injury, whether direct, incidental, or consequential, including property damage and damage to the product itself, incurred by persons regularly engaged in business activities consisting of providing goods or services for compensation;

(6) for the purposes of title II of this Act, "dignitary loss" means noneconomic loss resulting from harm caused by a product, compensable under State law, in the amount of $100,000, and consisting of pain and suffering or mental anguish associated with (A) the death of a parent, child or spouse; (B) serious and permanent disfigurement; (C) loss of a limb or organ; or (D) serious and permanent impairment of a bodily function;

(7) "economic loss" means any pecuniary loss resulting from harm which is allowed under State law;

(8) "exercise of reasonable care" means conduct of a person of ordinary prudence and intelligence using the attention, precaution and judgment that society ex-

pects of its members for the protection of their own interests and the interests of others;

(9) "harm" means any harm recognized under the law of the State in which the civil action is maintained, other than loss or damage caused to a product itself, or commercial loss, with respect to which recovery is available under the commercial or contract law of the State;

(10) "manufacturer" means (A) any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product) and who designs or formulates the product (or component part of the product) or has engaged another person to design or formulate the product (or component part of the product); (B) a product seller with respect to all aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller produces, creates, makes, or constructs and designs or formulates, or has engaged another person to design or formulate, an aspect of a product (or component part of a product) made by another; or (C) any product seller not described in clause (B) which holds itself out as a manufacturer to the user of a product;

(11) for purposes of title II of this Act, "net economic loss", in accordance with subsection (b) of this section, includes—

(A) reasonable expenses incurred for reasonably needed and used medical and rehabilitation care and services;

(B) lost income from work which the claimant would have performed if the claimant had not suffered harm, reduced by any income earned from substitute work actually performed by the claimant or by income the claimant would have earned in available appropriate work which the claimant was capable of performing but unreasonably failed to undertake;

(C) reasonable expenses incurred in obtaining ordinary and necessary services in lieu of those the claimant would have performed, not for income, but for the benefit of the claimant or the claimant's immediate family, if the claimant had not suffered the harm;

(D) lost earnings of a deceased person who suffered fatal harm caused by a product which, if the person had not died, would have been contributed to claimants who are entitled to receive benefits by reason of such person's death under the law of the place where the deceased person was domiciled; and

(E) reasonable expenses incurred by the claimant in preparation and submission of an offer of settlement or a response pursuant to section 201 of this Act, or in resolving a dispute involving the inclusion or exclusion of dignitary loss pursuant to section 201(d)(3) of this Act, including a reasonable attorney's fee,

less the total amount of collateral benefits paid or payable to the claimant by reason of the same harm;

(12) "noneconomic loss" means loss caused by a product other than economic loss or commercial loss;

(13) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity);

(14) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

(15) "product" means any object, substance, mixture, or raw material in a gaseous, liquid or solid state (A) which is capable of delivery itself or as an assem-

bled whole, in a mixed or combined state or as a component part or ingredient; (B) which is produced for introduction into trade or commerce; (C) which has intrinsic economic value; and (D) which is intended for sale or lease to persons for commercial or personal use; the term does not include human tissue, blood and blood products, or organs unless specifically recognized as a product pursuant to State law;

(16) "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce, or who installs, repairs or maintains the harm-causing aspect of a product; the term does not include—

(A) a seller or lessor of real property;

(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(C) any person who—

(i) acts in only a financial capacity with respect to the sale of a product; and

(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

(17) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

(b)(1) The lost income taken into account under subsection (a)(11)(B) of this section shall be reduced by the amount of all Federal, State, and local income taxes and any Social Security or other payroll taxes which would be applicable to such income, but which would not be applicable to compensation paid under this Act.

(2) Where harm occurs in circumstances that might entitle a claimant to benefits (including workers' compensation benefits) which would reduce the amount of the claimant's net economic loss in accordance with subsection (a)(11) of this section and it cannot reasonably, within the time provided for payment under section 205 of this Act or any reasonable extension of such time, be determined whether or in what

amount such benefits will be payable, the defendant shall place in an interest-bearing escrow account that portion of the economic loss which the defendant reasonably anticipates the claimant will receive from collateral sources, until the claimant's right to such benefits and the amount of such benefits finally has been determined under applicable law.

(3)(A) The total amount of compensation for economic loss paid or payable to a claimant from any other source shall, for purposes of subsection (a)(11) of this section, be reduced by the amount of legal fees and other costs incurred by the claimant in collecting such compensation.

(B) Attorney's fees may be on a contingent basis but, for the purposes of subsection (a)(11) of this section, shall be calculated solely on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and experience and the complexity of the case.

(4) Except as otherwise provided by any provision of Federal law, no program of compensation, whether public or private, the benefits of which would be deducted from a claimant's economic loss in order to calculate net economic loss under subsection (a)(11) of this section, may make payment of benefits secondary to payment of net economic loss by a defendant under this Act.

PREEMPTION

SEC. 103. (a) This Act governs any civil action brought against a manufacturer or product seller, or any theory, for harm caused by a product. A civil action brought against a manufacturer or product seller for loss or damage to a product itself or for commercial loss is not subject to this Act and shall be governed by applicable commercial or contract law.

(b) This Act supersedes any State law regarding recovery for harm caused by a product only to the extent that this Act establishes a rule of law applicable to any such recovery. Any issue arising under this Act that is not governed by any such rule of law shall be governed by applicable State of Federal law.

(c) Nothing this Act shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(2) supersede any Federal law, except the Federal Employees Compensation Act;

(3) waive or affect any defense of sovereign immunity asserted by the United States;

(4) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. 1602 et seq.);

(5) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation;

(6) except as provided in section 309 of this Act, affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum; or

(7) supersede any statutory or common law, including an action to abate a nuisance, that authorizes a State or person to institute an action for civil damages or civil penalties, cleanup costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat of such contamination or pollution.

(d) As used in this section, "environment" has the meaning given to such term in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(14)).

(e) This Act shall be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions.

JURISDICTION OF FEDERAL COURTS

SEC. 104. The district courts of the United States shall not have jurisdiction over any civil action pursuant to this

Act, based on section 1331 or 1337 of title 28, United States Code.

EFFECTIVE DATE

SEC. 105. (a) This Act shall take effect ninety days after the date of its enactment and shall apply to all civil actions pursuant to this Act commenced on or after such date, including any action in which the harm or the conduct which caused the harm occurred before the effective date of this Act.

(b) If any provision of this Act would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring any civil action pursuant to this Act within one year after the effective date of this Act.

TITLE II

EXPEDITED PRODUCT LIABILITY SETTLEMENTS

SEC. 201. (a) Any claimant may bring a civil action for harm caused by a product against the product's manufacturer or the product seller, pursuant to applicable State or Federal law, except to the extent such law is superseded by this Act.

(b) Any claimant may, in addition to any claim for relief made in accordance with State law, include in such claimant's complaint an offer of settlement. For the purposes of this title, an offer of settlement shall be limited to a claim for payment of the claimant's net economic loss, pursuant to section 205 of this title, and any dignitary loss.

(c) Any defendant in such an action may make an offer of settlement for the claimant's net economic loss and any dignitary loss. Such offer shall be made by certified mail, return receipt requested, within ninety days after service of the claimant's complaint, or within the time permitted pursuant to applicable State or Federal law for the responsive pleading, whichever is longer, except that if such pleading includes a motion to dismiss in accordance with applicable law, the defendant may make such an offer to the claimant within ten days after the court's determination regarding such motion. A copy of such offer shall be filed with the court within such time period.

(d)(1) The recipient of an offer of settlement made in accordance with subsection (b) or (c) of this section shall determine whether to accept or reject such offer, unless the recipient disputes the validity of such offer because of the inclusion or exclusion of dignitary loss. If such a dispute exists, paragraph (3) of this subsection shall apply.

(2) A recipient of such an offer shall provide to the offeror written notice of acceptance or rejection of such offer by certified mail, return receipt requested, within ninety days after the date on which such offer is made. A copy of such notice shall be filed with the court within such time period.

(3) If, during such time period, the recipient of such an offer of settlement disputes the validity of such offer because of the inclusion or exclusion of dignitary loss, the recipient shall file a motion with the court for a determination as to the validity of the offer of settlement. Within fifteen days after the filing of such motion, the court shall rule as a matter of law on such motion. If the court finds that the offer of settlement is invalid, a new offer of settlement consistent with the court's ruling may be made by the offeror within ten days after the date of such finding, and a response to such offer must be made within the time period and in the manner specified in paragraph (2) of this subsection. Such offer shall be made by certified mail, return receipt requested, and if the plaintiff makes such an offer, such offer shall be sent to all defendants. If the court finds that the offer of settlement is valid, there shall be a period of ten days in addition to the applicable time period under this section in which the recipient may respond to such offer of settlement.

(e) In any case in which an offer of settlement is made under subsection (b) or (c) of this section, the court may, upon motion made prior to the expiration of the applicable period for response, enter an order extending such period for discovery. Any such order shall contain a schedule for discovery of evidence material to the issues of the circumstances of the harm and the appropriate amount of relief, and shall not extend such period for more than ninety days. Any such action shall be accompanied by a supporting affidavit of the moving party setting forth the reasons why such extension is necessary to promote the interests of justice and stating that the information likely to be discovered is material and is not, after reasonable inquiry, otherwise available to the moving party.

(f) Subject to subsection (e) of this section, and unless otherwise agreed by the parties, failure to respond to an offer of settlement within the applicable time period set forth in subsection (d) of this section shall be deemed to be a rejection of such offer of settlement, and the provisions of sections 203 and 204 of this title shall apply.

(g) Any person who makes an offer of settlement or who agrees to accept such an offer pursuant to this title shall be bound by the court's determinations as to any disputes involving net economic loss. Such disputes shall be resolved by the court on an expedited basis, unless the parties agree to be bound by determinations made pursuant to any voluntary alternative dispute resolution procedures established or recognized under the law of the State in which the civil action for damages for harm caused by a product has been brought, or under the rules of the court in which such action is maintained.

(h) When an offer of settlement is made in accordance with this section, a civil action brought by a claimant shall be stayed until—

(1) notification by the recipient of such offer pursuant to subsection (d) of this section; or

(2) failure to respond to such offer within the time periods specified in subsection (d) or (e) of this section.

This subsection shall not apply to a dispute regarding dignitary loss pursuant to subsection (d) of this section or to discovery pursuant to subsection (e) of this section.

RIGHTS UPON SETTLEMENT

SEC. 202. (a) Subject to the provisions of section 206 of this title, a claimant may not bring or maintain a civil action against any person for damages arising from the same harm if—

(1) any defendant has accepted the claimant's offer of settlement made pursuant to section 201 of this title and has paid or agreed in writing to make payment to the claimant pursuant to section 205 of this title; or

(2) any defendant's offer of settlement made in accordance with section 201 of this title has been accepted in writing by the claimant.

In such circumstances, the court shall dismiss the civil action of the claimant upon motion by any party to the settlement, except that the court shall retain jurisdiction for the purpose of resolving disputes concerning the extent of the claimant's net economic loss and for other purposes consistent with this title.

(b) If a claimant is precluded from bring or maintaining a civil action under subsection (a) of this section, a defendant who has entered into a settlement with the claimant may not be made a defendant in any action brought by any other party for contribution, reimbursement, subrogation or indemnity for damages arising for the same harm, in the absence of a prior written agreement to the contrary, except as provided in section 206 of this title.

(c) Neither the claimant's employer nor any insurer shall have any right of subrogation, contribution, or indemnity against the defendant or any lien on the claimant's settlement form the defendant, nor shall the defendant have any right of contribution or indemnity against the claimant's employer or fellow employee.

REJECTION OF CLAIMANTS' OFFER OF SETTLEMENT

SEC. 203. (a) If a defendant rejects an offer of settlement made by a claimant in accordance with section 201 of this title, and a verdict is entered against the defendant in such action equal to or greater than the current value of such offer of settlement (as determined by the court), the court shall enter judgment against the defendant and shall include in such judgment an amount for the claimant's reasonable attorney's fees and costs, not to exceed $100,000, incurred by the claimant from the date on which the defendant rejected such offer or failed to respond as provided in section 201 of this title until the date of entry of the claimant's judgment. Such fees shall be offset against, but shall not exceed, any fees owned by the claimant to the claimant's attorney by reason of the verdict.

(b) The court shall review the amount for the claimant's reasonable attorney's fees and costs included in such judgment under subsection (a) of this section. The court shall reduce such amount if the court determines that the defendant had a reasonable basis for rejecting the offer of settlement made by a claimant in accordance with section 201 of this title because the case involved a novel question of law or complex questions of fact.

(c) For the purpose of this section, attorney's fees shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and experience and the complexity of the case.

RIGHTS UPON CLAIMANT'S REJECTION OF OFFER OF SETTLEMENT

SEC. 204. (a) In a civil action subject to this Act, if a defendant makes an offer of settlement pursuant to section 201 of this title and such offer is rejected by the claimant, the provisions of this section apply if the defendant is found liable in such action for harm to the claimant.

(b) The liability of the defendant for the claimant's economic loss shall not exceed the claimant's net economic loss.

(c)(1) The liability of the defendant for the claimant's noneconomic loss, other than punitive damages, shall not exceed $250,000 in any case in which the court finds that recovery for dignitary loss is appropriate. Such a determination shall be made by the court prior to the entry of judgment.

(2) In any case other than a case specified in paragraph (1) of this subsection, the liability of the defendant for the claimant's noneconomic loss, other than punitive damages, shall not exceed two times the claimant's economic loss or $50,000, whichever is less.

(d) In any such civil action tried by a jury, the jury shall be instructed to make specific findings of fact regarding the portion of any damage award allocable to economic loss and the portion of any damage award allocable to noneconomic loss. The jury shall not be instructed regarding the limitations on damages specified in subsections (b) and (c) of this section, but the award of damages in any such action shall be reduced by the court in accordance with such limitations.

(e) If more than one defendant joins in an offer of settlement made in accordance with section 201 of this title that is rejected by the claimant, the limitations on damages specified in this section shall apply in the aggregate to the liability of such defendants.

PAYMENT OF NET ECONOMIC LOSS

SEC. 205. (a) Subject to subsection (b) of this section and section 201 of this title, net economic loss shall be paid periodically as costs are incurred, but not later than thirty days after the date on which reasonable proof of the fact and amount of net economic loss incurred is submitted to any defendant who is a party to a settlement under this title.

(b)(1) An obligation to make payment of net economic loss may be discharged initially or at any time thereafter by a settlement agreement, including an agreement to make a lump-sum payment, except that no such discharge shall be made with respect to harm giving rise to an estimated value of net economic loss equal to or greater than $10,000 unless the court determines that the settlement is fair to the claimant.

(2) A settlement agreement may be modified upon a finding that a material and substantial change of circumstances has occurred after the date on which the agreement was made or that there is newly discovered evidence concerning the claimant's physical condition, loss, or rehabilitation which could not have been known or discovered in the exercise of reasonable diligence prior to the date on which such agreement was made.

(3) The court, upon application of any party to the settlement, may make appropriate orders concerning the protection and disbursement of the proceeds of a settlement agreement entered into under this section.

(c) If a period of five years has elapsed after the most recent claim for payment is made with respect to the harm at issue, the claimant shall not be entitled to receive payment for any additional net economic loss with respect to such harm.

REIMBURSEMENT

SEC. 206. (a) A defendant who has entered into a settlement with the claimant under this title shall be subrogated to any rights of the claimant against another person arising from or contributing to the harm at issue to the extent that the amount of loss paid or to be paid in the settlement exceeds such defendant's comparative proportion of responsibility for such loss.

(b) Any other person provided with notice by a defendant that an offer of settlement has been made shall, within ninety days after receipt of such notice, determine whether to contribute its proportionate share of such claim. Any potentially liable person who would benefit may join in the defendant's response to the claimant's offer of settlement or in an offer of settlement made by the defendant. Such person shall give written notice to the claimant and the defendant. A person who joins in such a settlement is deemed to have agreed to pay a share of the claimant's net economic loss pursuant to section 205 of this title and any digntary loss, based on the comparative responsibility of all those joined in the settlement other than the claimant.

(c) Persons who join in a settlement pursuant to subsection (b) of this section shall be bound by the court's determination, made upon motion by any such person, of their proportionate shares of responsibility for the claimant's loss, unless such persons agree to be bound by determinations made pursuant to any voluntary alternative dispute resolution procedures established or recognized under the law of the State in which the civil action for damages for harm caused by a product has been brought, or under the rules of the court in which such action is maintained.

(d)(1) If any person who is responsible for causing the claimant's harm and who has received notice under subsection (b) of this section refuses to contribute such person's proportionate share of loss pursuant to this title, a defendant who has entered into a settlement agreement pursuant to section 201 of this title to pay such loss may recover from such person a total amount equal to the amount of subrogation recovery pursuant to this section plus one-half of the amount of such subrogation recovery, in addition to reasonable attorney's fees and costs incurred in seeking such subrogation recovery.

(2) If an action is brought under this section against another person (other than the claimant's employer or fellow employee) for contribution, reimbursement or indemnity and the action is not a civil action subject to this Act, such action shall be governed by applicable standards of liability under State or Federal law.

(e) For the purposes of this section, attorney's fees shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and experience and the complexity of the case.

TITLE III

CIVIL ACTIONS

SEC. 301. A person seeking to recovery for harm caused by a product may bring a civil action against the product's manufacturer or product seller pursuant to applicable State or Federal law, except such law is superseded by this Act.

UNIFORM STANDARDS OF PRODUCT SELLER LIABILITY

SEC. 302. (a) Notwithstanding the provisions of section 301 of this title, in any civil action for harm caused by a product, a product seller other than a manufacturer is liable to a claimant, only if the claimant establishes by a preponderance of the evidence that—

(1)(A) the individual product unit which allegedly caused the harm complained of was sold by the defendant; (B) the product seller failed to exercise reasonable care with respect to the product; and (C) such failure to exercise reasonable care was a proximate cause of the claimant's harm; or

(2)(A) the product seller made an express warranty, independent of any express warranty made by a manufacturer as to the same product; (B) the product failed to conform to the warranty; and (C) the failure of the product to conform to the warranty caused the claimant's harm.

(b)(1) In determining whether a product seller is subject to liability under subsection (a)(1) of this section, the trier of fact may consider the effect of the conduct of the product seller with respect to the construction, inspection, or condition of the product, and any failure of the product seller to pass on adequate warnings or instructions from the product's manufacturer about the dangers and proper use of the product.

(2) A product seller shall not be liable in a civil action subject to this title based upon an alleged failure to provide warnings or instructions unless the claimant establishes that, when the product left the possession and control of the product seller, the product seller failed—

(A) to provide to the person to whom the product seller relinquished possession and control of the product any pamphlets, booklets, labels, inserts, or other written warnings or instructions received while the product was in the product seller's possession and control; or

(B) to make reasonable efforts to provide users with those warnings and instructions which it received after the product left its possession and control.

(3) A product seller shall not be liable in a civil action subject to this title except for breach of express warranty where there was no reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.

(c) A product seller shall be treated as the manufacturer of a product and shall be liable for harm to the claimant caused by a product as if it were the manufacturer of the product if—

(1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought; or

(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

SEC. 303. (a) Punitive damages may, if otherwise permitted by applicable law, be awarded in any civil action subject to this title to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by a product. A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions or warnings is not of itself such conduct. Except as provided in subsection (b) of this section, punitive damages may not be awarded in the absence of a compensatory award.

(b) In any civil action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages regardless of whether a claim is asserted under this section. The recovery of any such damages shall not bar a claim under this section.

(c)(1) Punitive damages shall not be awarded pursuant to this section against a manufacturer or product seller which caused the claimant's harm where—

(A) the drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)) or medical device (as defined under section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(h)) was subject to pre-market approval by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm or the adequacy of the packaging or labeling of such drug or device, and such drug was approved by the Food and Drug Administration; or

(B) the drug is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

The provisions of this paragraph shall not apply in any case in which the defendant withheld from or misrepresented to the Food and Drug Administration or any other agency or official of the Federal Government information that is material and relevant to the performance of such drug or device.

(2) Punitive damages shall not be awarded pursuant to this section against a manufacturer of an aircraft which caused the claimant's harm where—

(A) such aircraft was subject to pre-market certification by the Federal Aviation Administration with respect to the safety of the design or performance of the aspect of such aircraft which caused the claimant's harm or the adequacy of the warnings regarding the operation or maintenance of such aircraft; and

(B) the aircraft was certified by the Federal Aviation Administration under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.).

The provisions of this paragraph shall not apply in any case in which the defendant withheld from or misrepresented to the Federal Aviation Administration information that is material and relevant to the performance or the maintenace or operation of such aircraft.

UNIFORM TIME LIMITATIONS ON LIABILITY

SEC. 304. (a) Any civil action subject to this title shall be barred unless the complaint is filed within two years of the time the claimant discovered or, in the exercise of reasonable care, should have discovered the harm and its cause, except that any such action of a person under legal disability may be filed within two years after the disability ceases. If the commencement of such an action is stayed or enjoined, the running of the statute of limitations under this section shall be suspended for the period of the stay or injunction.

(b)(1) Any civil action subject to this title shall be barred if a product which is a capital good is alleged to have caused harm which is not a toxic harm unless the complaint is served and filed within twenty-five years after the time of delivery of the product.

(2)(A) With respect to any good other than a capital good, a manufacturer or product seller shall not be subject to liability to a claimant for harm caused by a product in any civil action subject to this title if the manufacturer proves, by a preponderance of the evidence, that the harm was caused after the product's useful safe life.

(B) A manufacturer or product seller may be subject to liability for harm caused by a product after its useful safe life if—

(i) the manufacturer has warranted that the product can be utilized safely for a time longer than the useful safe life;

(ii) the manufacturer intentionally misrepresents facts about the product or intentionally conceals information about the product and that concealment was the proximate cause of the claimant's harm; or

(iii) the harm was caused by exposure to a product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after such useful safe life.

(C) In any civil action brought pursuant to this paragraph, there is a presumption that the harm was caused after the useful safe life of the product if the harm was caused more than ten years after the time of delivery of the product. Such presumption may be rebutted by a preponderance of the evidence.

(3) A motor vehicle, vessel, aircraft, or railroad used primarily to transport passengers for hire shall not be subject to the provisions of this subsection.

(4) As used in this subsection—

(A) the term "time of delivery" means the time when a product is delivered to its first purchaser or lessee who was not involved in the business of manufacturing or selling such product or using it as a component part of another product to be sold; and

(B) a product's "useful safe life" begins at the time of the first use of the product following delivery and extends for the time during which the product would normally be likely to perform or be stored, or both, in a safe manner.

(c) As used in this section, the term—

(1) "capital good" means any product, or any component of any such product, which is of a character subject to allowance for depreciation under the Internal Revenue Code of 1954, and which was—

(A) used in a trade or business;

(B) held for the production of income; or

(C) sold or donated to a governmental or private entity for the production of goods, for training, for demonstration, or other similar purposes; and

(2) "toxic harm" means harm which is functional impairment, illness, or death of a human being resulting from exposure to an object, substance, mixture, raw material or physical agent of particular chemical composition.

(d) Nothing in this section shall affect the right of any person who is subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person who is responsible for such harm.

COUNSEL'S LIABILITY FOR EXCESSIVE COSTS

SEC. 305. (a) In the case of any civil action subject to this title, any attorney or other person who is admitted to conduct cases in any court of the State in which such civil action is pending and whose conduct in the course of such action is calculated to delay resolution of the action, or who is determined by the court (after consideration of the circumstances) not to be in good faith, shall be subject to pecuniary sanctions to be imposed by the court. Any such sanction shall be equal to an amount not less than the total amount of court costs, fees, and expenses (including attorney's fees) reasonably attributable to the conduct.

(b)(1) Notwithstanding any other provision of law, if the court finds that an attorney representing either a claimant or a defendant in a civil action subject to this title acted in the manner prescribed in paragraph (2) of this subsection, such attorney shall be liable for costs, fees, and expenses, including attorney's fees reasonably incurred to respond to, proceed with, or resist such action.

(2) Any such attorney shall be liable as specified in paragraph (1) of this subsection if the court finds that such attorney commenced a civil action subject to this title or maintained a defense in such an action without a good faith belief by such attorney that there was a reasonable basis in law and in fact for the recovery of the damages (including punitive damages, if pleaded) or for such defense.

(3) The provisions of paragraph (1) of this subsection shall not apply if a claim for punitive damages is withdrawn at least thirty days prior to the commencement of trial.

(c) Nothing in this section shall be construed to subject an attorney to sanctions for pursuing a novel but credible theory of law or defense.

RECORD RETENTION

SEC. 306. (a) Any claimant and any person who is a party to a civil action subject to this title who anticipates bringing such an action, or who has notice that he or she may be made a party to such an action, shall retain all material, documents and other data (including, in the case of the claimant, the product alleged to have caused the claimant's harm) within such person's possession, custody or control that are relevant or may lead to the discovery of evidence relevant to the claim or action.

(b) In any civil action subject to this title, if the court determines that a party has willfully disposed of, destroyed, concealed, altered or removed any material, document or data in violation of subsection (a) of this section or any State or Federal rule, regulation or statute requiring the retention of such material, document or data, there shall be a rebuttable presumption that the facts to which the material, document or data relate are established in a manner adverse to the position of the party who has committed the violation. The court shall assess a civil penalty against such party in an appropriate amount not less than $1,000 and order such party to pay the other party's costs, including reasonable attorney's fees, incurred in proving the violation.

(c) In any other civil action subject to this title, in which the court determines that a party has nonwillfully violated subsection (a) of this section or any State or Federal rule, regulation or statute requiring the retention of such material, document or data, and that no other means are available to establish the facts to which the unavailable material, document or data relate, the court may, in the interest of justice, establish a rebuttable presumption that the facts to which the material, document or data relate are, for the purposes of such action, established in a manner adverse to the party who has committed the violation.

UNIFORM STANDARDS FOR OFFSET WORKERS' OF COMPENSATION BENEFITS

SEC. 307. (a) In any civil action subject to this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, any damages awarded shall be reduced by the sum of the amount paid as workers' compensation benefits for such harm and the present value of all workers' compensation benefits to which the employee is or would be entitled for such harm. The determination of workers' compensation benefits by the trier of fact in a civil action subject to this title shall have no binding effect on and shall not be used as evidence in any other proceeding.

(b) In any civil action subject to this title in which damages are sought for harm for which the person injured is entitled to receive compensation under any State or Federal workers' compensation law, the action shall, on application of the claimant made at claimant's sole discretion, be stayed until such time as the full amount payable as workers' compensation benefits has been finally determined under such workers' compensation law.

(c)(1) Except as provided in paragraph (2) of this subsection, unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product, neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller if the harm is one for which a civil action for harm caused by a product may be brought pursuant to this Act.

(2) Paragraph (1) of this subsection shall not apply to any civil action involving workplaces covered by a State-operated worker's compensation insurance fund, if the State had adopted, prior to June 3, 1986, a statute eliminating workers' compensation subrogation liens in cases where the claimant's employer or coemployee has been found to be at fault.

(d) In any civil action subject to this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, no third-party tortfeasor may maintain any action for implied indemnity or contribution against the employer, any coemployee or the exclusive representative of the person who was injured.

(e) Nothing in this Act shall be construed to affect any provision of a State or Federal workers' compensation law which prohibits a person who is or would have been entitled to receive compensation under any such law, or any other person whose claim is or would have been derivative from such a claim, from recovering for harm caused by a product in any action other than a workers' compensation claim against a present or former employer or workers' compensation insurer of the employer, any coemployee or the exclusive representative of the person who was injured. Any action other than such a workers' compensation claim shall be prohibited, except that nothing in this Act shall be construed to affect any State or Federal workers' compensation law which permits recovery based on a claim of an intentional tort by the employer or coemployee, where the claimant's harm was caused by such an intentional tort.

(f) Without regard to when the harm giving rise to the claim occurred, the provisions of this section shall not apply to any person subject to or covered by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.).

SEVERAL LIABILITY FOR NONECONOMIC DAMAGES

SEC. 308. (a) In any product liability action, the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility as determined under subsection (b) of this section. A separate judgment shall be rendered against such defendant for that amount.

(b) For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c) As used in this section, the term—

(1) "noneconomic damages" means subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation; the term does not include objectively verifiable monetary losses including, but not limited to, medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, rehabilitation and training expenses, loss of employment or loss of business or employment opportunities; and

(2) "product liability action" includes any action involving a claim, third-party claim, cross-claim, counterclaim or contribution claim in a civil action in which a manufacturer or product seller is found liable for harm caused by a product.

FORUM NON CONVENIENS

SEC. 309. Any court in which an action subject to this title is commenced shall decline to exercise jurisdiction over such action if the court determines that the convenience of the parties and the interests of justice dictate that the action should proceed in another State or foreign jurisdiction or that the plaintiff has taken up residence in the State in which the court in located principally for the purpose of invoking the jurisdiction of such court with respect to such action. In any such action maintained by a citizen of a foreign jurisdiction which arises out of a transaction which occurred in a foreign jurisdiction, there is created a presumption, rebuttable by clear and convincing evidence, that the action should proceed in a foreign jurisdiction.

ADMISSIBLE EVIDENCE

SEC. 310. (a)(1) All relevant evidence is admissible in any civil action brought pursuant to this Act, except as otherwise provided by the Constitution of the United States, Act of Congress, or any other rule prescribed by the Supreme Court of the United States pursuant to statutory authority, or, with respect to any action based on section 1332 of title 28, United States Code, by the Federal Rules of Evidence. Evidence which is not relevant is not admissible in any such action.

(2) Evidence which is relevent may be excluded in any civil action brought pursuant to this Act if—

(A) its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence;

(B) such evidence is inadmissible hearsay under applicable State law; or

(C) the privilege of a witness, person, government, or State under applicable State law provides for the exclusion of such evidence.

(3) As used in this subsection, the term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without such evidence.

(b) Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove liability in any action subject to this title, in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

DEFENSES INVOLVING INTOXICATING ALCOHOL OR DRUGS

SEC. 311. (a) In any civil action subject to this Act in which all defendants are manufacturers or product sellers, a manufacturer or product seller may assert in complete defense of such action that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than 50 per centum responsible for such claimant's harm.

(b) In any civil action subject to this Act in which not all defendants are manufacturers or product sellers and the trier of fact determines that no liability exists against those defendants who are not manufacturers or product sellers, the court shall enter a judgment notwithstanding the verdict in favor of any defendant which is a manufacturer or product seller if it is proved that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than 50 per centum responsible for such claimant's harm.

(c)(1) For purposes of this section, the determination of whether a person was under the influence of intoxicating alcohol shall be made pursuant to applicable State law.

(2) As used in this section, the term "drug" means any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant.

TITLE IV

PRODUCT LIABILITY INSURANCE REPORTING

SEC. 401. (a) The Secretary of Commerce (hereinafter referred to as "the Secretary") shall provide to the Congress before June 30 of each year after the date of enactment of this Act a report analyzing the impact of this Act on insurers which issue product liability insurance either separately or in conjunction with other insurance; and on self-insurers, captive insurers and risk retention groups.

(b) To carry out the purposes of this section, the Secretary shall collect from each insurer all data considered necessary by the Secretary to present and analyze fully the impact of this Act on such insurers.

(c) Within one hundred and twenty days after the date of enactment of this Act, the Secretary shall issue such regulations as may be necessary to implement the purposes, and carry out the provisions, of this section. Such regulations shall be promulgated in accordance with section 553 of title 5, United States Code. Such regulations shall—

(1) require the reporting of information sufficiently comprehensive to make possible a full evaluation of the impact of this Act on such insurers;

(2) specify the information to be provided by such insurers and the format of such information, taking into account methods to minimize the paperwork and cost burdens on such insurers and the Federal Government; and

(3) provide, to the maximum extent practicable, that such information is obtained from existing sources, including, but not limited to, State insurance commissioners, recognized insurance statistical agencies, the Administrative Office of the United States Courts and the National Center for State Courts.

(d) The Secretary may subpoena witnesses and records related to the report required under this section from any place in the United States. If a witness disobeys such a subpoena, the Secretary may petition any district court of the United States to enforce such subpoena. The court may punish a refusal to obey an order of the court to comply with such a subpoena as a contempt of court.

STATEMENT OF HON. RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. WILLARD. Thank you, Mr. Chairman.

It is a pleasure to be here today. I would ask if my prepared statement and the accompanying letter could be placed in the record, I would like to just briefly summarize it at this time.

Senator HATCH. Without objection, we will put all complete statements in the record as though they were completely delivered. We do appreciate summaries. Thank you.

Mr. WILLARD. Thank you, Mr. Chairman.

As I stated before this committee in earlier hearings on S. 2046, Senator McConnell's tort reform measure, the administration strongly supports tort reform, in particular, reform in the area of product liability at the Federal level.

In fact earlier this year, the administration suggested three tort reform measures. Our product liability bill was introduced by Senator Kasten as an amendment to S. 100, and Senator McConnell introduced the other two bills, S. 2440 and S. 2441, together with Chairman Thurmond, and the bills are now pending before this committee.

All three bills were based on the recommendations of the administration's Tort Policy Working Group which was formed last year to examine the crisis in the availability and affordability of liability insurance. That report which the group issued found that there were a number of problems with the functioning of our tort system.

We believe that many of the reform measures that we recommended would be successful in alleviating the problems that we have seen in liability insurance. In fact, we are pleased that many States have adopted a number of those measures this year with regard to their State tort law.

I would like to just mention three basic concerns we have with regard to S. 2760 as reported by the Commerce Committee.

The first is that it does not insure that fault remain central to product liability law. The trend to de facto no fault liability which our report comments on, and which we have seen in many courts with regard to product liability law, does not deter harmful conduct but instead serves to punish innocent companies and individuals by subjecting them to liability for what is often beneficial conduct.

Thus, in an earlier letter to the committee we strongly urged the Senate to remedy this defect in S. 2760 by putting in a provision such as that found in section 5 of the Product Liability Reform Act of 1986 which was proposed by the administration and introduced by Senator Kasten.

In this regard we understand that an amendment to add a fault-based liability provision will be pursued by Senators Kasten, Lugar and Kassebaum when S. 2760 is considered by the full Senate.

Our second major concern is, that while S. 2760 alleviates part of the problem with joint and several, or "deep-pocket liability," we do not believe it goes far enough to solve the problem.

The bill eliminates joint and several or "deep-pocket liability" for noneconomic damages in product cases, but not with regard to economic damages.

We understand that Senator Pressler has indicated his intention to offer an amendment to S. 2760 to deal with this problem, and we certainly recommend that that be favorably considered.

The third and final consideration that I would like to raise is that of preemption. The preemption language of section 103(b) of the bill, we believe, is far more intrusive of State law than necessary.

As we explained in our letter, we think the justification for Federal legislation is to remove unnecessary burdens on interstate commerce.

However, where a State law is more protective of interstate commerce than the proposed Federal legislation, we see no reason for preemption. Therefore, we would strongly urge the Senate to adopt the kind of approach in section 4(b) of the administration's product liability bill, instead of that in S. 2760.

Our letter discusses a number of other detailed concerns which we hope will also be corrected when the bill is taken up by the full Senate. We do, however, strongly support the idea of Federal product liability legislation, and we would encourage the Senate to take favorable action on this legislation this year. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE

I appreciate the opportunity to appear before the Senate Judiciary Committee to present the views of the Administration on S.2760, the Product Liability Reform Act recently reported by the Senate Commerce Committee.

As I stated before this Committee in its earlier hearings on Senator Mitchell McConnell's general tort reform measure, S.2046, the Administration strongly supports appropriate Federal product liability reform. In fact, earlier this year, the Administration sent to Congress three tort reform measures. One of those bills, the Product Liability Reform Act of 1986, was introduced by Senator Kasten as an amendment to S.100, his original product liability reform bill. As you know the Adminstration's other two tort reform measures dealing with the liability of the United States and of Federal contractors were introduced by Senator McConnell and Chairman Thurmond as S.2440 and S.2441, and currently are pending before the Committee.

All three bills were based on the recommendations of the Administration's Tort Policy Working Group, and were intended to make meaningful reforms to remedy some of the most troubling excesses of our civil justice system. As Chairman of the Tort Policy Working Group, I would add that the Administration is highly encouraged by the fact that many of the States have enacted some form of tort liability reform legislation--in many instances adopting measures similar to those proposed by the Tort Policy Working Group.

As we have stated in earlier hearings, the Adminstration believes that an essential element of any meaningful tort reform is a return to fault-based liability, and a corresponding rejection of "deep-pocket liability" where the defendant's ability to pay rather than his responsibility for the injury determines his liability. Attached to my prepared statement is an August 15, 1986, letter to Chairman Thurmond which outlines in detail the Administration's specific concerns with S.2760 as reported by the Commerce Committee. I would like to summarize some of those concerns for you now.

First, S.2760 does not ensure that fault remains central to product liability law. Fault is and must remain the cornerstone of tort law. As such, it serves as the measure by which we determine and allocate the responsibility for an injury and deter harmful conduct. Liability without fault, however, does not deter harmful conduct, but serves to punish innocent companies and individuals by subjecting them to liability for what is often socially beneficial conduct.

Accordingly, we strongly urge the Senate to remedy this deficiency by adding a provision to S.2760 that would ensure that product liability remains fault-based. Such a provision can be found in Section 5 of the Product Liability Reform Act proposed by the Administration and in Section 5(a) of S. 2441. In this regard, we understand that an amendment to add a fault-based liability provision will be pursued by Senators Kasten, Lugar and Kassebaum when S. 2760 is considered by the full Senate.

Another major concern with S. 2760 is that it does not adequately address the problems of joint and several liability. As I mentioned earlier, we believe that reversing the trend toward "deep-pocket liability" is essential to meaningful product liability reform. In recent years, the doctrine of joint and several liability has been used to make one person responsible for the wrongdoing of another. While this doctrine may be appropriate in certain instances--for example, where the defendants have acted in concert--the modern practice is to use the doctrine to reach deep-pocket defendants.

We believe that the Commerce Committee recognized this troubling trend, and attempted to lessen the problem by abolishing joint liability for non-economic damages in product liability actions. Unfortunately, this approach only addresses part of the problem. Under the Commerce Committee bill, a defendant minimally at fault can still face staggering liability for economic damages for injuries caused largely by others. There is no clear logic for holding a person liable for the wrongdoing of another based solely on the type of damages that are alleged. We understand in this regard that Senator Pressler, who sponsored the joint and several liability provision in S. 2760, has indicated his intention to offer an amendment to limit the use of the doctrine of joint and several liability--regardless of the type of damages sought--only to those cases involving concerted action.

In the attached letter we also discuss the possibility that the joint and several liability provision in S. 2760 could be interpreted as preempting existing State joint and several reforms that are more restrictive than that proposed by the Commerce Committee bill. While this unwarranted preemption may not be the Committee's intention, it is essential to correct this potential problem.

This brings me to a third concern. The preemption language of section 103(b) of the bill is far more intrusive of State law than necessary. As explained in our letter, the need for Federal product liability legislation stems from the need to protect the flow of interstate commerce from state liability doctrines that jeopardize that flow, threaten the viability of productive American enterprise, and that harm consumers by raising the price of goods and removing desired products from the marketplace. It seems obvious to us that any federal legislation should be directed only at those liability schemes that present such a threat, and should not preempt state law that does not burden commerce. The justification for Federal preemption under the Commerce Clause of the Constitution is reserved for those situations where Federal legislation is needed to promote the free flow of interstate commerce, not to further obstruct it. Again, while we do not believe that it was the Commerce Committee's intention to preempt state tort law (including tort reforms) that provide greater protection from excessive liability, we are concerned that the section could have precisely that effect. Accordingly, we strongly urge the Senate to strike the overreaching language of Section 103(b), and substitute a less intrusive approach like that in Section 4(b) of the Administration's product liability bill and Section 4(b) of S.2441.

The attached letter discusses in detail several other concerns we have with S.2760, which we firmly hope will be corrected when the bill is taken up by the full Senate. And, of course, it should go without saying that the Administration strongly urges the Senate to pass meaningful product liability legislation before the adjournment of this Congress. I appreciate the opportunity to present the views of the Administration, and will be pleased to answer any questions you may have.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 15, 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Thurmond:

It is our understanding that the Judiciary Committee is considering holding hearings in early September on product liability reform, and, specifically, on the Product Liability Reform Act recently reported by the Commerce Committee (S.2760)[1]. This letter is to apprise you and the other members of the Judiciary Committee of the Administration's concerns with regard to S. 2760.

In voting out a product liability reform bill, the Commerce Committee has addressed an issue of extreme importance to our entire Nation, both to businesses and consumers alike. The Commerce Committee should be commended in this regard for their effort to deal with an exceptionally serious problem. As discussed below, however, we believe that S. 2760 suffers of a number of significant deficiencies which we urge the Senate to review and remedy.

1. S. 2760 does not ensure that fault remains central to product liability law.

As discussed at some length in the recent report of the Administration's Tort Policy Working Group on the insurance crisis, one of the gravest problems of tort law is the extent to which the concept of fault has deteriorated over recent years. This problem is particularly serious in the area of product liability, where defendants all too often are found liable -- frequently for immense sums -- in situations where they have done nothing wrong. The development of doctrines and practices which effectively result in no-fault tort liability is among the most pernicious aspects of modern tort law, and is without a doubt a significant contributing factor to the current crisis in the availability and affordability of liability insurance. No-fault tort liability not only perversely undermines the deterrent role of tort law by punishing those who are not at fault for an injury, but also jeopardizes the viability of United States businesses that provide goods and services desired by and of benefit to the American public.

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[1] While the bill has been introduced, the Commerce Committee's report has not yet been released.

It thus is crucial that any federal product liability legislation recognize and reaffirm the need to ensure that product liability be predicated on fault. S. 2760, unfortunately, contains no such provision. Nothing in the bill ensures that a defendant will only be found liable where that defendant has engaged in wrongful activity.

We urge that this deficiency be remedied by incorporating within the bill a provision which precludes no-fault product liability. In this regard, we refer the Senate to Section 5 of the Product Liability Reform Act of 1986 (enclosed) recently submitted by the Administration to the Congress, and introduced by Senator Robert Kasten as an amendment to S. 100. Senator Mitchell McConnell also has introduced a similar provision, Section 5(a) of S. 2441, the Government Contractor Liability Reform Act of 1986. These Sections contain several key liability limitations, which if codified would substantially correct the worst abuses of no-fault product liability.

The Administration, however, does not advocate the abolition of strict product liability; nor does Section 5 of the Product Liability Reform Act of 1986 preclude strict product liability or mandate the application of a negligence standard. Rather, Section 5 would ensure that strict product liability -- as was clearly envisioned when the doctrine was originally developed -- remain a fault-based liability standard, and not be used to achieve no-fault liability results.

We strongly urge that such a provision be incorporated into S. 2760, and that Section 5 of the Administration bill or Section 5(a) of S. 2441 be used as a model for its consideration.

2. S. 2760 does not adequately address the problems of joint and several liability.

Another serious problem of modern tort law is the extent to which joint and several liability is abused to the point where it often is little more than a vehicle for exploiting "deep pockets." Joint and several liability not only makes one party liable for the wrongdoing of another, but also leads to situations where a party only minimally responsible for an injury is forced to pay all of the plaintiff's damages. Moreover, joint and several liability severely exacerbates insurance availability and affordability problems by making it difficult to assess the risks associated with a particular product or activity. That is, while an insurer may be able to review the practices and safety measures of a particular manufacturer, the insurer often may be unable to assess the risks associated with other persons with which the manufacturer may be found jointly and severally liable. And, of course, any insurance coverage will be more expensive since the manufacturer will not only need coverage for its own products and activities, but also for the products and activities of others for which it may ultimately have to bear the financial burden under joint and several liability.

While S. 2760 addresses the issue of joint and several liability in Section 308 of the bill, unfortunately its treatment of the problem is inadequate. Section 308 only abolishes joint and several liability for non-economic damages such as pain and suffering and mental anguish. It does not abolish joint and several liability for economic damages.

We do not understand the logic of abolishing joint and several liability for one element of damages while retaining it for another element. If, as is widely appreciated, the application of joint and several liability often is unfair and in need of limitation, it should be limited as to all damages, economic as well as non-economic.

Moreover, as discussed in greater detail below, because of the preemptive effect of S. 2760 (see Section 103(b)), Section 308 may preempt and supersede State joint and several liability reform provisions more restrictive than Section 308. As you know, a number of States have adopted reforms addressing joint and several liability.[2] Should Sections 103(b) and 308 be enacted as reported by the Commerce Committee, many of these State tort reform provisions might be preempted in product liability cases. Thus, contrary to the purpose of S. 2760, in many States Section 308 could actually make the law on joint and several liability worse -- not better.

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[2] The following States have abolished or modified their rule on joint and several liability: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, Vermont, Washington, Wyoming (source: Liability Alert).

Accordingly, we urge that joint and several liability be abolished in its entirety for product liability actions, except in those instances where parties have acted in concert to cause an injury. In this regard, we refer the Senate to Section 6 of the Product Liability Reform Act of 1986,[3] which provides a more sensible and fair limitation on joint and several liability.

3. S. 2760 is far more intrusive of State law than necessary.

Section 103(b) of S. 2760 provides as follows:

> This Act supersedes any State law regarding recovery for any injury or damage caused by a product only to the extent that this Act establishes a rule of law applicable to any such recovery. Any issue arising under this Act that is not governed by any such rule of law shall be governed by applicable State or Federal law.

It is the Administration's view that the only justification for federal product liability legislation is the need to protect interstate commerce from State liability doctrines that jeopardize the flow of products in commerce and threaten the viability of American manufacturers and small businesses. To that end, federal legislation should be directed solely at limiting those excesses of State law that present such a threat. Federal legislation that goes beyond this framework -- that is, that seeks to impose federal standards and procedures merely for the sake of such standards or procedures -- cannot be justified as a legitimate application of the Commerce Clause of the United States Constitution.

Accordingly, there is no justification for federal legislation preempting State legal doctrines which are not in fact impeding interstate commerce. And there clearly is no justification whatsoever under the Commerce Clause for imposing upon a State federal liability doctrines that place a greater burden upon interstate commerce than the prevailing law of that State. A broad federal preemption of State law would be both a misuse of federal power and an illegitimate and unnecessary intrusion into State law.

Section 103(b) of S. 2760 effectively mandates that where the bill provides a rule of law, any comparable State rule of law

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[3] See also Section 6 of S. 2441.

-- even where more restrictive of liability -- is preempted[4]. This would be the case even though under no conceivable rationale could the more restrictive State rule of law be considered an undue burden on interstate commerce.

We simply see no justification for preempting State liability doctrines that are more restrictive of liability than the federal liability provisions that are finally adopted. The purpose of federal product liability reform legislation is to limit liability in those situations where it impedes interstate commerce. If a State determines that even further restrictions on liability are necessary in its own legal system, there is no legitimate federal interest which justifies the abrogation of that decision. To the contrary, such preemption is incompatible with federalism, and represents a substantial overreaching under the Commerce Clause. Simply put, such preemption does not secure or advance a legitimate federal interest.

In contrast to Section 103(b), the preemption provision contained in the Product Liability Reform Act of 1986 (Section 4(b))[5] is much more limited in scope, and thus less intrusive of State law. Section 4(b) provides as follows:

> The provisions of this Act shall preempt and supersede any State law to the extent such law is inconsistent with the limitations contained in such provisions. The provisions of this Act shall not preempt or supersede any State law that provides for defenses or places limitations on a person's liability in addition to those contained in this Act.

Section 4(b) makes it clear that the limitations contained in the bill only apply where necessary -- that is, where State law places an undue burden on interstate commerce. As important, the provision expressly states that State liability doctrines that place even more restrictive limitations on liability will not be preempted or superseded. In other words, to the extent that a State has decided that the serious problems of its tort liability system require more substantial reforms than the Congress is willing to enact, Section 4(b) makes it clear that those State reforms will not be abrogated by the bill.[6]

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[4] For example, Section 311 provides that a defendant may assert as a complete defense that plaintiff's intoxication or drug abuse was more than 50% responsible for his injury. While this provision is in and of itself unobjectionable, it may very well preempt State rules that permit defendants to cite intoxication or drug abuse as a complete or partial defense even where such intoxication or drug abuse is found to be less than 50% responsible for plaintiff's injury. (This, for instance, would probably be the case in States which have retained the doctrine of contributory negligence.) We see absolutely no justification for preempting such a State rule.

[5] See also Section 4(b) of S. 2441.

We believe that this approach to preemption is far preferable to the approach taken by the Commerce Committee. Accordingly, we strongly urge that the preemption language contained in the Administration's product liability reform bill be adopted in lieu of the provision currently in S. 2760.

4. S. 2760 contains a number of other provisions which present serious problems.

In addition to the above three concerns, S. 2760 contains a number of other provisions which present serious problems.

a. Section 102 ("Definitions")

Section 102(b)(4)of S. 2760 provides that:

> Except as otherwise provided by any provision of Federal Law, no program of compensation, whether public or private, the benefits of which would be deducted from a claimant's economic loss in order to calculate net economic loss under section (a)(11) of this section, may make payment of benefits secondary to payment of net economic loss by a defendant under this Act.

This provision, in conjunction with other provisions in Section 102,[7] appears to prohibit the United States from making the payment of many of its benefits secondary to a tort award. The only exception would seem to be where federal law specifically provides to the contrary. While it is not entirely clear how the courts would implement this provision, it is likely that where the United States is prohibited from making payment of its benefits secondary to a tort award, it also would be prohibited from seeking restitution through a subrogated claim against the tortfeasor.

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[6] An approach to preemption that does not preempt State standards that are more stringent or offer greater protection is by no means foreign to the Congress. See, e.g., Section 12 of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461; Section 5(2) of the Equal Credit Opportunity Act, 15 U.S.C. § 1691d(f); Section 112 of the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act, 15 U.S.C. § 2311(c)(2); Section 116 of the Clean Air Act, 42 U.S.C. § 7416.

[7] Section 102(a)(11) defines "net economic loss" as various pecuniary elements of loss less collateral benefits." Section 102(a)(3) defines "collateral benefits" as "all benefits and advantages received or entitled to be received (regardless of any (continued...)

Section 102(b)(4) appears to be plainly inconsistent with the "payor of last resort" policy the Administration has been attempting to establish and strengthen under many federal benefit programs such as Medicare and Medicaid. For example, such an alteration of the order of payment could cause a significant diminution in reimbursement to the Medicare trust fund and increased costs under the Medicaid program to both federal and State treasuries.

It should be noted in this regard that numerous provisions of the Social Security Act are directed towards assuring that the liability of public assistance programs remains secondary to that of responsible third parties. While we interpret Section 102(b)(4) as leaving these provisions in place, because there is considerable ambiguity in the way in which the Section is drafted, the precise relationship of benefits under the Social Security Act to settlement payments under Title II of S. 2760 would be the subject of extensive litigation and judicial construction. For example, Sections 102(a)(3) and 102(a)(11) can be read to require the reduction of Title II settlements by collateral government benefits, even where the government is legally the payor of last resort. If such in fact is the case, were the government to eliminate or reduce the benefits as a result of the settlement, the claimant would not only receive a lower settlement, but also would lose all or part of the government benefits which were used to justify the lower settlement. Since such a result would be unjust, it is highly likely that the courts would interpret the bill in such a way as to avoid both a lower settlement and a reduction of government benefits. Under certain situations this could jeopardize the current practice of the government obtaining restitution either directly from the beneficiary or through a subrogated claim.

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[7] (...continued)
right any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien or otherwise) by any claimant harmed by a product or by any other person as reimbursement of loss because of harm to person or property payable or required to be paid to claimant, under (A) any Federal law . . . ."

Finally, it should be noted that this provision would require the American taxpayer rather than the tortfeasor (except where the contrary is specifically provided by law) to compensate plaintiffs for certain elements of the damages caused in whole or in part by the tortfeasor.

This is in marked contrast to the Administration's product liability reform bill, which specifically exempts from the reduction of product liability awards any collateral benefits that are "the subject of a reasonably founded claim of subrogation, reimbursement or lien."[8] Thus, the Administration bill only prohibits double recovery by the plaintiff. It does not require that the government instead of the tortfeasor pay such compensation.

We, accordingly, urge that Section 102 be amended so that it not include as a covered collateral source, or deduct from a claimant's economic loss, any payment or benefit provided under a federally funded program where that payment or benefit is (or by law is required to be) the subject of a reasonably founded claim of subrogation, reimbursement or lien.

b. Section 205 ("Payment of Net Economic Loss")

Section 205 provides that a settlement entered into under Title II of the bill "may be modified upon a finding that a material and substantial change of circumstances has occurred."[9] By depriving Title II settlements of finality, this provision will substantially increase both the amount of product liability litigation, as well as the transaction costs associated with such litigation.

Under Section 205, a settlement involving economic damages would never be final; it could always -- perhaps for decades -- be reopened for further litigation. The result in many instances would be never ending litigation as the parties attempt to reopen settlements to increase or decrease payments of economic damages to reflect changing circumstances.[10]

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[8] Section 9 of the Product Liability Reform Act of 1986. See also Section 9 of S. 2441.

[9] See also Section 202(a) (court retains jurisdiction to resolve disputes concerning economic damages).

[10] While it is not entirely clear, we construe Section 205 to permit both the plaintiff and the defendant to seek modification of the settlement.

For good reasons, it has been longstanding practice throughout the Nation that tort settlements and judgments constitute the final resolution of each party's claims and defenses. While this necessarily involves some degree of speculation as to future damages, it serves the important purpose of putting an end to litigation. In the absence of such finality, litigation would be more protracted, expensive and burdensome.[11]

This provision is inconsistent with the reasoning of the Commerce Committee that excessive transaction costs are a primary justification for the expedited settlement procedure established by Title II of the bill, because the provision, by its very nature, can only further increase transaction costs. Accordingly, the provisions eliminating finality of Title II settlements should be deleted. To the extent that the Senate wishes to develop an alternative approach to periodic payments that protects finality, we refer the Senate to Section 8 of the Product Liability Reform Act of 1986.[12] Indeed, subsection (c) specifically provides that such periodic payments "may not be reopened at any time to contest, amend, or modify the schedule or amount of the payments in the absence of fraud."

c. Section 206 ("Reimbursement")

Section 206 of S. 2760 provides that a defendant who enters into a settlement under Title II may file a contribution action against any other "responsible" party who has refused to join in the settlement. If such a contribution suit is successful, the party seeking contribution obtains an additional 50% recovery on top of the contribution payment as well as its attorneys' fees and litigation expenses.

This provision is almost certain to spawn a flood of contribution litigation. The 50% sanction and attorneys' fees provision will lead many parties to sue for contribution who under normal circumstances would not file a contribution action. In addition, the provision will make it difficult to settle contribution disputes since the party seeking contribution will have every incentive to force its contribution claim to trial.

Because contribution actions generally involve resolution of the parties' relative fault, and frequently raise complex issues of causation, such actions often necessitate the litigation of the plaintiff's underlying tort claim, even though the plaintiff may have fully settled his claim. Accordingly, contribution actions defeat the goal of settlement inducement provisions to resolve disputes quickly and inexpensively.

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[11] There, of course, are some bases for reopening a settlement or judgment. See Federal Rule of Civil Procedure 60.

[12] See also Section 8 of S. 2441.

Section 206 thus may have the unfortunate and ironic result of transforming product liability litigation from direct actions by plaintiffs against one or more defendants into contribution actions among several defendants. If, as it seems likely, Section 206 has this effect, the transaction cost savings which presumably would be achieved through the Title II settlement process would be largely illusory. Accordingly, we urge that the 50% contribution bonus and attorneys' fee award be deleted from Section 206.

d. Section 303 ("Uniform Standards for Awards of Punitive Damages")

Section 303 of the bill provides that punitive damages may be awarded in a product liability action where the plaintiff can demonstrate by clear and convincing evidence that the defendant's conduct manifested a "conscious, flagrant indifference" to the safety of others. We believe that the "conscious, flagrant indifference" standard is less exacting than the standard currently in force in many States -- particularly in those States that require a showing of malice -- and will result in punitive damage awards where such awards would otherwise be unavailable. Consequently, the provision also may cause an increase in the number of punitive damages claims.[13]

Punitive damages are a serious problem of product liability law which any federal product liability reform legislation should address. The Administration, in the Product Liability Reform Act of 1986, recommended a fixed monetary limit on such awards. Other approaches may also be merited. But there simply is no justification for federal legislation which would make it easier for punitive damages to be awarded in many States. Such legislation does not "reform" product liability law, but only exacerbates the problems that underlie the current liability and insurance crisis.[14]

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[13] We do not believe, however, that Section 303 would establish a right to punitive damages in those States that do not currently recognize such damages in product liability actions.

[14] In this regard, we also note that Section 305, which applies sanctions to frivolous claims, specifically exempts punitive damages claims as long as such claims are withdrawn at (continued...)

Accordingly, Section 303 should be amended to provide that punitive damages may only be awarded where plaintiff can demonstrate "conscious, flagrant indifference" in addition to the applicable State law standard.

e. Section 306 ("Record Retention")

Section 306 provides that a person "who has notice that he or she may be made a party to such an action, shall retain all material, documents and other data . . . within such person's possession, custody or control that are relevant or may lead to the discovery of evidence relevant to the claim or action."

This section could require the retention of millions of documents of questionable relevancy to a claim which is never ultimately filed. The provision would be extraordinarily burdensome, particularly to small businesses that may not have the facilities or resources to store for an indefinite period all documents which relate to a particular product. Moreover, since it is often difficult if not impossible to predict what material, documents and other data may eventually prove relevant in the course of protracted and extensive discovery, the provision is at best unrealistic in its underlying assumption that putative defendants will be able to identify on the basis of a possibly vague notice what may ultimately prove relevant. Because the sanctions for both the willful and non-willful disposal of a document eventually deemed to be relevant are quite severe, persons subject to this provision will be forced to retain virtually everything for years.

It also should be noted that this provision may seriously prejudice the interests of the United States in litigation under the Federal Tort Claims Act. While Section 306 would create an often unmanageable burden for many parties, the Section would place particularly unrealistic requirements on the United States as a defendant. The United States generates tens of billions of documents every year, many of which must in the interests of economy and efficiency be disposed of promptly.[15] Moreover, were the courts to apply this requirement government-

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[14] (...continued) least 30 days prior to commencement of trial. Exemption of frivolous punitive damage claims from such sanctions appears to run contrary to the policy underlying Federal Rule of Civil Procedure 11, which applies to the entire pleading.

[15] Indeed, for many documents timely disposal is mandated by law.

wide, it would be impossible to try to identify every document in every agency that conceivably could ultimately be found relevant to a claim filed against the United States.[16] However, any failure by the United States in such a case to identify and retain such documents would expose the United States to severe litigation sanctions which could substantially prejudice the ability of the United States to defend itself.[17]

If the Congress enacts this provision, it ultimately may have to consider the establishment and funding of a new federal bureaucracy to implement this provision for the United States, or, alternatively, be willing to accept potentially major and unmerited litigation losses.

f. Section 310 ("Admissible Evidence")

Section 310(a) provides that "all relevant evidence is admissible in any product liability action," except as provided by the Constitution, federal statute or the Federal Rules of Evidence. The Section identifies certain limited exceptions, including unfairly prejudicial evidence, hearsay and privileged evidence.

It is quite unclear what Section 310(a) is intended to accomplish, or what it would accomplish if it were enacted -- which, in and of itself, is a matter of serious concern. But, one possible interpretation of the provision is that it will require State courts to apply the Federal Rules of Evidence in all product liability actions.

Should the provision be construed in such a way, it would represent a massive and wholly unnecessary intrusion by the federal government into State procedural law. No problem of product liability law or tort law has been identified as justification for such a wholesale abrogation of State law; indeed, it is difficult to conceive of any rationale which could possibly justify such a result.

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[16] For example, the discovery against the United States in the on-going asbestos product liability litigation has already identified over two billion pages of potentially relevant government documents in the federal record centers. This represents only a portion of all potentially relevant government documents, since it does not include documents held in the federal archives or by the originating agencies.

[17] One obvious effect of this provision will be for parties to seek discovery of every conceivable document in the hope that some documents will have been disposed and thereby give them the benefit of the evidentiary presumption established by the Section. In fact, the provision will almost certainly increase both the amount of discovery and the degree to which plaintiffs engage in unnecessary and burdensome discovery.

Moreover, the provision could present serious problems for those States which have rules of evidence different from the federal rules. State court judges and many attorneys are trained in their State's rules of evidence, not in the federal rules. The provision thus will create unnecessary confusion and complexity in the State courts, both at the trial and appellate levels. In addition, cases which include both product liability and non-product liability claims would present a troubling dilemma. Do the federal rules apply to all issues, or does the judge attempt to distinguish the issues for purposes of evidentiary rulings, or is the judge required to construct a hybrid set of rules? In addition, State rules of trial practice and civil procedure may not mesh well with the Federal Rules of Evidence, having been designed to complement the State's own rules of evidence rather than those of the federal government. This may lead to some highly anomalous and confusing results.

We thus strongly urge that Section 310 be deleted from the bill.

g. Section 401 ("Product Liability Insurance Reporting")

Section 401 would create a new and potentially massive federal bureaucracy by requiring the collection of data and a yearly report by the Secretary of Commerce "analyzing the impact of the Act on insurers which issue product liability insurance either separately or in conjunction with other insurance; and on self-insurers, captive insurers and risk retention groups."

We do not believe that the collection of such data by the federal government would have any effect on the availability or affordability of product liability insurance. But even assuming that there were a basis for collecting such insurance related data, the federal government is neither the appropriate nor best vehicle for obtaining such data. The regulation of the insurance industry has appropriately been left to the individual States, and the collection and analysis of insurance data is best left with those who regulate and are intimately familiar with that industry.

The Commerce Committee, in reporting S. 2760, has addressed an issue of critical importance to this Nation -- the need to reform product liability law. We believe that the Judiciary Committee and the Senate, in considering the merits of S. 2760 will share the Commerce Committee's recognition of both the depth of the problem and the urgent need for reform. It is the Administration's hope that during such deliberations all of the above discussed issues will be carefully considered. We will be pleased, of course, to provide clarification of any of our views should the Committee or the Senate so desire.

The Office of Management and Budget has advised that there is no objection to the presentation of this report to the Congress.

Sincerely,

John R Bolton

John R. Bolton
Assistant Attorney General

Enclosure

cc: Honorable Robert Dole
Honorable John C. Danforth

Senator HATCH. Well, thank you. As you know, I strongly share your views on Federalism, and certainly the justification for Federal products liability legislation is the need to protect interstate commerce from State liability doctrines that jeopardize the flow of products and commerce, and thereby threaten the vitality of American manufacturers and small businesses.

Now as you have stated, the preemption provision contained in the administration bill, the Product Liability Reform Act of 1985, is less intrusive of State law in that it specifically states that its provisions shall not preempt or supersede any State law that provides for defenses or places limitations on a person's liability, in addition to those contained in the act.

However, would not this sort of a partial preemption fail to reach the goals of achieving uniformity and predictability, within the product liability laws?

Mr. WILLARD. That would be correct, Mr. Chairman. We do feel, though, that absolute uniformity is an unattainable goal in this field. That is, as long as cases are decided in 50 different State courts; as long as legislation is subjected to varying interpretations by judges and juries, there is going to be some nonuniformity.

We do not think that that is unacceptable. What we consider to be unacceptable is when the lack of uniformity goes so far that in some States, excessive liability actually chokes off the provision of necessary products, or creates an excessive burden on interstate commerce.

So we think some nonuniformity can be lived with as long as we have a limit on what we regard as excessive liability doctrines.

Senator HATCH. OK. Your testimony as to the importance of returning to a fault-based liability system in the product liability context is well stated.

I also share your view that the doctrine of joint and several liability should be abolished for economic as well as noneconomic damages in product liability actions.

You have clearly stated, the administration believes that an essential element of any meaningful tort reform package must include a return to a fault-based liability and abolition of joint and several liability, except in circumstances, or instances, where parties have acted in concert to cause an injury.

Does that mean that the administration could support S. 2760 only with the addition of these particular concepts?

Mr. WILLARD. Our position is that these concepts are important and that without those provisions in S. 2760 the bill would fail to alleviate the problems that we have cited with regard to products liability law.

Senator HATCH. In your testimony, you make no mention of the settlement procedures contained in S. 2760. Would you please comment on the merits of this particular portion of the bill, and on needed improvements.

Mr. WILLARD. This matter is discussed in the letter which is attached to the testimony. One of the problems with the settlement provisions, and one of the difficulties in discussing it is that the provisions are so complicated.

As in any case where you attempt to shift the incentives with regard to litigation, it is difficult to predict in advance how they will work out; whether they will serve to increase the incentives for people to file claims, or decrease them.

In some regards, these provisions might well serve to increase the total number of product liability claims that are made, which would be counterproductive to the goal of reducing this burden on interstate commerce.

For that reason we think that it would be well-advised to consider whether these provisions are necessary, or at least whether the provisions should have a number of technical kinds of modifications which we have suggested to make them work more smoothly.

Senator **Hatch**. I would like to bring your attention to the insurance liability reporting section of this particular bill. I note that in your written testimony, you feel that this particular insurance reporting requirement is overly burdensome. Nevertheless, the evidence does seem to indicate that the burdens facing the Nation, in the area of product liability and tort liability generally, are part and parcel of some of the problems created by the insurance industry. At least some are advocating that particular position.

Now I assume that you agree that further regulation of the insurance industry is basically a matter for the States to take care of, but could this reporting section be reworked, in your eyes, so that it might be more beneficial?

Mr. **Willard**. In our view, the reporting is best done by the regulatory authorities who are more familiar with the insurance industry. I think that exactly how burdensome this particular provision will be is something better addressed by industry groups and State authorities rather than by the administration, which has not dealt with regulation of the insurance industry previously.

I think that the collecting of information is something that obviously is hard to be against, but we think this could be done more efficiently at the State level. Where there is a need for interstate cooperation, one could use groups like the National Association of Insurance Commissioners, which is an organization of all the State insurance commissioners, which could work together, cooperatively, to develop national data. Obviously, this is preferable to creating a new bureaucracy in the U.S. Commerce Department to undertake this task.

Senator **Hatch**. All right. Thank you. Senator Metzenbaum, we will turn to you.

Senator **Metzenbaum**. Mr. Willard, it is nice to see you again, but not under these circumstances. Because when we have met on previous occasions, you were up for confirmation, and I indicated my concern about your failure to adequately prosecute companies that had been involved in manufacture of vaccines, and the Food and Drug Administration had recommended prosecution and you dropped the case. And you know my views. You and I have met in my office on that subject.

I have told you of my disappointment with you, and I have told you of my concern, and questioned how you, as a father of children, could have been in that position.

Now we have another matter before us, and again it seems the Department of Justice finds itself on the side of intervening, and of coming down for Federal involvement in a matter that I am not certain the Federal Government ought to be involved in.

It may be a matter of State's rights, particular as to your intervention in an individual case, and then, seemingly, to be in a contradictory position with some of the previous actions of other members of the Department of Justice, in saying that you should not be intervening in tort claim actions.

Now one of the most fundamental problems I have with the recommendations of the administration, and the provisions of this bill, is that it would place an arbitrary cap on the amount a person could recover for pain and suffering, no matter how severe the injury.

As I understand, you support this bill with a cap of $100,000. As a practical matter, that puts a cap of $250,000 on recovery for pain and suffering. Now in my own State of Ohio, there is a little boy by the name of Tyler White. My guess is that Tyler White is probably about the age of one of your children at the moment.

This is Tyler White's picture. Tyler White was given an injection of DPT vaccine. Today, as a result, he is severely and permanently retarded. He is 4 years old now. He has to be restrained by an attendant who has to be with him so he does not injure himself.

He has to wear a protective helmet over his little head. He sleeps in an enclosed crib and may always have to do that. He has severe autistic symptoms. He does not recognize his own family, his parents, his brothers, or his sisters.

Tyler White will never read or write. He will never have a job. A jury in a State court case awarded Tyler $2.1 million, the jury did not say how much was for pain and suffering, but persons knowledgeable about the case say it is a major portion of the award. Under your proposal, and with your support, this little boy would receive about $4 a day as compensation for the terrible suffering, based on a normal life expectancy. Under this bill, he would receive about $10 a day for pain and suffering. Do you really think that that is fair?

Do you really think that that is a fair amount of compensation and that we in the Federal Government ought to stick our nose in and say what the amount should be for the pain and suffering of this little child, who will never have a normal life?

Do you think that, Mr. Willard?

Mr. **Willard**. Senator, our proposal does not place any limit at all on what can be recovered for medical treatment, rehabilitation; therapy, loss of income, or any other economically ascertainable element of damages.

We do suggest that there should be some limit on the amount awarded for pain and suffering in these cases because that is an intangible award that is not subject to any kind of objective proof.

In one case a jury might award $50,000; in another case a jury might award $5 or $10 million for essentially the same injury.

This unpredictability produces a sort of lottery-like aspect to our civil justice system, in which the amount of money people receive depends upon the way their case is presented emotionally to a jury and what a jury happens to do in a case.

Senator **Metzenbaum**. This is an administration that prides itself on keeping the Federal Government's nose out of the individual's rights. How can this administration say that this little boy ought to get either $4 or $10, and take away that right from the jury?

Where do you get the prerogative to say this is the right amount? Would it be the right amount for your child, or my child, or my grandchild? You know very well it would not be the right amount.

But you have the audacity to come in here and support a bill, throwing a picayune amount of money at some suffering child or some suffering adult.

I admit there is a problem. I recognize there is a problem, but all you want to do is put the total burden on the injured child, or the injured individual. I just wonder, where do you get that authority? What makes you feel that you are so right, that you are smarter than the jury? That you have the right, from an autocratic standpoint, to say, "This is the amount," that a child, or an individual, ought to receive for their pain and suffering.

Where does it come from? What makes you think you are so right about that?

Mr. WILLARD. Senator, the Constitution authorizes Congress to regulate interstate commerce. The administration's Tort Policy Working Group found that product liability law was having a significant impact on interstate commerce.

Senator METZENBAUM. Your study group was loaded to begin with.

Mr. WILLARD. In the area of vaccines, in particular, we did look at the effect of liability awards on the availability of vaccines such as the DPT vaccine.

We found that many of the companies that had formerly made this vaccine had stopped doing so because of the high cost of liability.

At a couple of points in the last 2 years we were down to one company in the entire country making the vaccine. Officials at the Department of Health and Human Services were concerned that there would be a serious health problem in our country because of excessive liability, if this vaccine were not manufactured by anyone and not available for children.

The DPT vaccine has saved many thousands of children's lives by preventing them from contracting pertussis or whooping cough. That is a very substantial benefit to public health that is endangered by the liability system.

Senator METZENBAUM. I agree with you, that withdrawing vaccine manufacture from the marketplace would indeed be a problem. But is the only solution to that problem to take away the rights of those who are injured, to obtain fair redress in the courts? Is that the only solution you can think of? Is that all the innovative thinkers in this administration can come up with?

Mr. WILLARD. Senator, the question is whether or not the vaccine that is currently being made is a defective vaccine.

Senator METZENBAUM. That is not for you to decide. The jury has decided that in the cases. That is not for you to decide. You do not have that information. You do not have that intelligence to be able to say if it is defective. The jury has said it is and who are you to say it is not?

Mr. WILLARD. Well, Senator, the Food and Drug Administration has only approved one vaccine to use for pertussis, and that is the one that was made, and was challenged in this litigation.

If juries find that the one vaccine that the FDA is willing to approve as safe and effective creates excessive liability for the vaccine's manufacturer, then there will not be any vaccines available for DTP.

Senator METZENBAUM. That is correct. But is the only way you can solve the problem to take away the right of the plaintiff, or the injured child, to recover?

Mr. WILLARD. Senator, in our——

Senator METZENBAUM. Is that the only solution you can think up?

Mr. WILLARD. In our view, the role of the tort system is to allow recovery where there has been some wrongful conduct on the part of the defendant, where they have made a defective or unsafe product. The role of the tort system is not to provide compensation for all of the injuries or illnesses that occur in our society.

The Consumer Federation of America estimated, for example, that there are about 30 million product-related injuries in America every year. Yet, of this amount, there are only about 70,000 product liability lawsuits.

So our tort system does not now, nor properly should it ever, serve as a basis to compensate everyone who is injured in connection with a product.

Senator METZENBAUM. It does not. Many cases are lost. As a matter of fact, according to an article in Business Week, in a nation of 240 million people, there have only been 1,642 awards of $1 million, or more, in the last 14 years.

And what about the gleeful winners? According to the jury verdict—and this is from the article in Business Week—

> And how about the gleeful winners? According to Jury Verdict Research, Inc., the Ohio concern that tracks big awards, they were hardly in shape to enjoy the spoils. In more than two-thirds of the cases they suffered permanent paralysis, brain damage, amputations, or deaths.

Many of the cases are lost. Many times a jury does not conclude that there should be an award. You only win the case if you can prove fault, and you are saying that there is no fault because the FDA has approved the vaccine, as I understand your testimony. Is that your point?

Mr. WILLARD. It is our position, and the position of the officials of the Food and Drug Administration who are responsible for licensing drugs—that the particular DPT vaccine in question is safe and effective, that it is not a defective drug, and that there is not any other vaccine currently available on the market that is approved for use.

Senator METZENBAUM. You think therefore, that because they concluded it, that the jury and the judge, who came to a contrary conclusion, should be overriden by the Congress? Is that your point?

Mr. WILLARD. In our view, any determination of a defect in a case like that would be wrong. Part of the problem with the system, though, is that in many States, the trend has not been towards requiring a showing of fault but rather toward a de facto sort of no-fault liability.

Senator **Metzenbaum**. Res ipse loquitur. You learned about that in college. The thing speaks for itself. And is that what you are saying the theory is in some cases.

Mr. **Willard**. Well, it has actually been an extension of strict liability doctrine to create a kind of an absolute liability.

Senator **Metzenbaum**. Mr. Willard, your division has decided to get involved in the Tyler White case that I described. The Department filed a request with the court to delay the case, so the Department could decide if it wanted to argue against the award.

The Department filed a statement saying it is considering the filing of an amicus curiae brief in support of the Appellant who in this case is the company that made the vaccine.

As far as I know, this is the only time the Department of Justice has seen fit to meddle in a State court civil case, to try to overturn a jury award in a personal injury case.

In my opinion, I would guess that the Department of Justice has plenty of things to do with the taxpayers' money besides interfere in a State court case, to try to argue against an award in a case such as this.

Can you give me any other examples, where the Department tried to get involved, or has become involved in a State personal injury case, after the jury had made an award to someone who was severely injured? Have you done that before?

Mr. **Willard**. Yes, Senator. We did it last year in a case in Kansas in which a jury had awarded $10 million in damages, $8 million of it punitive damages, against the manufacturer of the oral polio vaccine. The award was based, on the theory that they should have used the old Salk vaccine instead of the newer Sabin vaccine. It was argued that the Sabin vaccine was defective. We filed a friend of the court brief with the Kansas Supreme Court on behalf of the Food and Drug Administration, pointing out, that as a matter of Federal health policy, the Sabin vaccine had been determined to be more effective in preventing polio.

Recently, by a four to three vote, the Kansas Supreme Court overturned a lower court's award of damages in that case.

I regard that as being similar to the case you have referred to involving the DPT vaccine.

Senator **Metzenbaum**. And S. 2760. Well, that is the only time. Before this administration, did the Federal Government ever get involved in a State court case after an award had been made?

That was last year you got involved in the Kansas case. What about before that? In other words, is this a new incursion by the Federal Government into State's rights issues, by giving the State the right to decide the amount of a jury verdict?

Now this is the administration which prides itself upon recognizing State's rights. Has that occurred in previous years? I do not know of it; maybe you do.

Mr. **Willard**. We frequently participate as a friend of the court in State court proceedings of various kinds. Obviously——

Senator **Metzenbaum**. I am not talking about that. I am not talking about that. I am talking about personal injury cases. Before this administration came into office, has there ever been a case where the Federal Government came in and said a jury verdict is too high?

Mr. **Willard**. I do not know, Senator. I was not here then.

Senator **Metzenbaum**. Well, you would know by the record of the Department. I mean, you are not going to tell me that you only know the things that have occurred while you have been in office.

You know the record of the Department. I am sure somebody has told you that it has, or has never happened before, and that this is precedent making?

Mr. **Willard**. I do not know whether it has or has not happened before, Senator.

Senator **Metzenbaum**. Do you find it at all uncomfortable, that under your leadership, the Department refused to prosecute in a case that you and I have discussed before? I think it was the company that manufactured vaccines. Baby formula. You refused to prosecute the baby formula manufacturer even though the Food and Drug Administration about which you spoke so highly of a couple of moments ago, asked you to prosecute, and you, Mr. Willard, decided not to prosecute and drop the case. I think you gave them some very small fine. Does this give you any kind of a message? The kind of message that I talked with you about in my office, when I was concerned as to what kind of leadership you would provide in this role, and what kind of human being you are, in order to always wind up on the side of the pharmaceutical companies, and never on the side of those who have children?

Mr. **Willard**. Senator, your request in that particular matter is now under review and I am not in a position to comment on it.

Senator **Metzenbaum**. What particular matter? You mean my request with reference to going forward with prosecution in that case?

Has not the statute expired in that case?

Mr. **Willard**. Senator, as you may recall, you wrote, asking for further review of that case, and the matter is now under review in the Department.

Senator **Metzenbaum**. When may I expect an answer?

Mr. **Willard**. I do not know.

Senator **Metzenbaum**. How long ago did I write to you?

Mr. **Willard**. Several months ago.

Senator **Metzenbaum**. Taking a long time to review?

Mr. **Willard**. The review is not being conducted in my office, Senator.

Senator **Metzenbaum**. Let me go a little bit further with you on this matter. S. 2760 allows manufacturers of drugs and medical devices to escape punitive damages, altogether, if they receive premarket approval from FDA.

To my knowledge, this defense for compliance with government standards is not the rule under any State tort law. How will this rule affect victims of medical devices such as the artificial heart valve manufactured by Shilies, Inc., a California corporation?

Over 120 people have died after their valves failed. There were recalls of valves because of structural weaknesses and we have not succeeded in getting all faulty valves off the market.

The company has settled dozens of lawsuits reportedly amounting to millions of dollars filed by victims of the families, all victims of failed valves.

What would a dead victim's family have to prove in order to collect punitive damages under this bill?

Mr. WILLARD. Senator, first, the provision you are referring to was not proposed by the administration but was added in the Commerce Committee. We did not propose it.

Senator METZENBAUM. Do you support it, or you oppose it?

Mr. WILLARD. We think it would be better to consider relief in this area on a general basis rather than limiting it to particular industries as this amendment does.

Senator METZENBAUM. So you would broaden it, is that what you are saying?

Mr. WILLARD. Well, we think that reform in the area of punitive damages is warranted, as a general matter. Our working group did not recommend this device. It is not the way we would have chosen to go about doing it.

How this would apply to the particular case you have mentioned, I do not know.

Senator METZENBAUM. Mr. Chairman, I see many of my colleagues have arrived. I do not want to impose upon the committee's time. I do have additional questions which I will submit in writing. Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Metzenbaum. We will turn to Senator McConnell.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McCONNELL. Thank you, Mr. Chairman.

As you know, I, for one, have long concluded that our tort liability system has broken down, and that it is the responsibility of the Congress to make suitable repairs.

I am certainly not alone in that judgment. Indeed, the American people, as a whole, have reached the very same conclusion.

According to a recent Lou Harris survey, and I quote: "The American people favor radical changes in the laws governing liability suits." Two-thirds of those surveyed believe that it is too easy to sue for damages. Two-thirds believe that the size of cash settlements is too excessive, and that maximum awards, other than medical benefits, ought to be capped at $150,000. Now that is the American people talking there in that survey.

In addition, that survey found that Americans are most decisive in attributing the blame for these systematic problems, and again I quote, to the lawyers, "lawyers looking for big contingency fees." An astounding 80 percent of those surveyed concluded that that was a big part of the problem.

Personally, I would not place the entire onus of the liability crisis upon what 80 percent of our citizens seem to regard as greedy lawyers, but it is certainly eye-opening to see just how far the public's esteem for the legal profession seems to have fallen.

No. I would be among the first to point out the dismal record of the insurance industry in recent years. Careless management, unsound underwriting practices, and cut-throat, carefree competition within the industry, has certainly exacerbated the current liability crisis.

Perhaps this needs to be studied further. But it is misleading, distorted and arrogant to assert that we are merely contending with an insurance crisis. The American people have not been fooled, and neither will the Congress of the United States. The evidence is abundant and incontrovertible. We have been witnessing a liability system run amuck. I know that some of the facts and statistics, and horror stories that have emerged recently have produced skepticism and controversy. Many of these will be reviewed during this particular hearing.

But allow me to offer a few statistics, totally neutral in themselves, that are quite revealing. According to information published by the Administrative Office of the U.S. Courts, it is quite apparent that we are witnessing dramatic trends in the litigiousness of our society.

In 1961, 21,205 tort suits commenced in the Federal courts. By 1985, that figure had almost doubled to 41,593. Those figures represent all tort and personal injury suits filed.

If we delete—I repeat—delete those suits involving motor vehicles and property suits, the figures are more pertinent. In 1961, there were 10,577 such actions, while in 1985, there were 30,784, almost a threefold increase.

One extraordinary statistic is that while motor vehicle suits actually decreased substantially over that period of time, from 9,083 to 6,776—that is, by about a third—medical malpractice suits commencing in Federal court went from 385 in 1978 to 1,779 in 1985, an incredible percentage increase of 462 percent.

Similarly, between 1974 and 1984, product liability suits in Federal courts increased 580 percent. Trends such as these in such areas as medical malpractice, product liability, municipal liability, have also been established by such reputable organizations as the Rand Corp. Institute for Civil Justice.

These studies point not only to an increase in the numbers of such actions but also to the relatively higher damage awards and incidences of punitive damages in these types of suits.

One illustration, as revealed by the institute, is that between 1960 and 1979, in Cook County, IL—that is Chicago—a plaintiff who was injured due to medical malpractice was awarded an amount that was three and a half times the amount awarded to a plaintiff for a similar injury due to an accident on property, such as a slip and fall case, obviously a bias in favor of suits against physicians.

It is not my intent to continue to rattle off such statistics at this time. What these numbers demonstrate, however, is most disturbing.

They evidence the mounting randomness and inequity of justice in tort actions. Other evidence points to the disintegration of our tort system from one based upon fault and one's own culpability for wrongful actions, to one based upon sympathy and the search for the deep pocket.

Having said all this, I must now confess, as you know Mr. Willard, that I do not necessarily endorse S. 2760, either in concept, or in the manner in which specific provisions are currently drafted. I would submit that the bill is far too narrow in scope. It covers but a limited and inadequate range of tort actions. It fails to encompass either professional or municipal liability, or even general commercial liability.

To that extent this proposal is flawed. To ignore the plight of doctors, architects, engineers, our cities and towns, and even boy scouts, and others, is simply unacceptable.

I have introduced legislation that proceeds along a broader path, that would endeavor to redress our decaying tort system in a uniform, comprehensive, and systematic manner.

It is my intent, as you know, to offer this in the form of a substitute at the appropriate time on the floor of the Senate.

With those brief opening remarks, I would like to ask you this, Mr. Willard. A number of news accounts have suggested that the liability insurance availability, or affordability crisis is ending, and I wonder if you agree with that? If the liability insurance crisis is abating, what impact would this have upon the underlying causes of the liability crisis as identified by your own tort policy working group?

Mr. WILLARD. Senator, as our working group report indicates, we view the availability crisis part of this problem as one that may very well abate as the economic health of the insurance industry returns. The industry seems to be recovering, so that insurance will be more widely available than it has been. Insurance affordability is another problem though because insurance is basically a pass-through mechanism. It takes the liability costs imposed by the civil justice system and passes them through to people who pay the premiums.

Although the cyclical problem may be easing, the ultimate cost is still there, both in terms of premium levels as well as in the impact on the availability of goods and services.

In particular, I would note that one reason the crisis has abated is that insurance companies have been engaging in more careful underwriting practices. That is to say, they have been limiting their coverage. They have been not undertaking to underwrite what they view as more risky kinds of coverage.

This has been a particular problem for manufacturers in such areas as general aviation, pharmaceuticals, and chemicals.

Similarly, with regard to medical malpractice, as you point out, the impact is there and is continuing. Many specialists are stopping their practice and leaving their fields altogether. This is especially true in obstetrics. The high costs of premiums continues, even though availability as such may be not as much of a problem.

So, in conclusion, I would say that the problem is still there, even though it may not be quite as acute as it was a few months ago.

Senator MCCONNELL. The Department commented, briefly, on the insurance data-collecting requirement of S. 2760. What benefits, if any, would this produce in your view?

Mr. WILLARD. I do not see many benefits at all, Senator. I think information is always desirable, but as I indicated, this information is being collected by State insurance regulatory authorities, and to the extent there is a need for cooperation, there are existing mechanisms that can do that.

Senator McCONNELL. I have felt, along with a lot of others, a good deal of frustration by the insurance industry's role in the crisis and, exactly what that is, and I think it can be persuasively argued that there is an absence of data, or information, to substantiate what the industry's role is in the development of the advent of the crisis.

I am wondering what your view would be on a study by GAO to determine the role of the insurance industry in the liability crisis, obviously, with some kind of specific time limit though, so that we do not have an unending study here.

How would you feel about that, Mr. Willard?

Mr. WILLARD. Well, Senator, as I said earlier, it is hard to be opposed to collecting data or studying problems, but I do not agree that the problem here is an absence of data. Rather, the problem is a multiplicity of data. It is not that we do not have the data. We have reams of data. I have seen so many studies, so many statistics——

Senator McCONNELL. We just do not know what to do with it.

Mr. WILLARD. The problem is analyzing it and making sense of it. That is the problem our working group faced with regard to the insurance problem.

One of the problems is, the answer you get depends on the question you ask. GAO has made, I think, some questionable assumptions.

For example, they do not think that you should take into account policyholder dividends as being an expense of an insurance company when in fact policyholder dividends in effect reduce the cost of insurance to people who receive them.

When I get a dividend from my automobile insurance company, it is subtracted from the premium I have to pay. I would be very unhappy if I did not get that dividend, and yet GAO says you should ignore it.

So, I am not sure that a new study by GAO would necessarily put all the questions to rest. It might just further revive the debate.

Senator McCONNELL. Well, if you are satisfied the data is there, and you have looked at it, I gather it is your conclusion that—at the risk of repeating what you said earlier—that even if the liability insurance crisis abates, there is still a need for tort reform at least in the product area in the view of the administration?

Mr. WILLARD. That is our view.

Senator McCONNELL. Title II of S. 2760 would create a so-called expedited product liability settlement procedure, and, frankly, I find the provision to be confusing.

I wonder if you could shed some light for me on the operation of this particular section and tell me whether you think it is workable.

Mr. WILLARD. Senator, I find it to be confusing, too, and I am not sure I can help you on that. I think it is a very complex provision, and as I indicated earlier, it will be difficult to figure out in advance how it is going to work in terms of its overall impact on product liability claims.

I suspect that it may serve to stimulate more claims, although it may also reduce the amount of money awarded in particular claims.

But it is very hard to predict, when you are dealing with incentives like this, what the final impact will be. For that reason, we would prefer a more straight-out approach to reforming product liability law, along the lines suggested in the administration's bill which was introduced by Senator Kasten.

Senator McCONNELL. Assuming you were going to go with some alternative dispute resolution approach, is there a better way to do it?

Mr. WILLARD. Well, we do think that it should be linked to the procedures employed by the forum where the litigation is being conducted. For that reason, our recommendation was that A.D.R. mechanisms be studied, but then implemented on a State level for cases in State court, and on a Federal level for cases in Federal court. Because the way in which alternative dispute resolution works out depends a lot on how it fits in with the rules of civil procedure that are being followed in the particular jurisdiction.

So unless you wanted to move all these cases into Federal court, which I certainly would not want to see happen, I think it would be difficult to develop a national alternative dispute resolution program, that would be the optimum here.

Senator McCONNELL. As you well know, I prefer a comprehensive approach to tort reform at the Federal level and rather than engaging in an extended debate over concepts of federalism as it may apply to this particular issue, since I am certain that we disagree on that, lets talk about some specific problems with preemption in the area of products only.

Specifically, is it not unusual in real life, practical life out there, to have litigation limited to product liability causes of action?

Isn't it more likely, especially with multiple defendants, to have various overlapping causes of action? Is it fair to have some defendants protected by the provisions of a bill such as this one, but allow others to face the uncertainties and inequities of the current law? Illustration, an automobile collision.

The auto manufacturer being sued for product design and manufacturing defect and breach of warranty. The tire manufacturer essentially for the same thing. The municipality in the same case is sued for failure to post proper road signs or to keep the road in proper repair.

And the hospital surgeon and the ambulances being sued for malpractice. All in the same case. Do you have any observations about how that would work out in real life, and whether that is a fair and equitable approach to suing a bunch of defendants?

Mr. WILLARD. Well, we always have the problem, having a dual system of government and adjudication in this country, of the interface of the two systems. We now have the possibility, in many cases, of asserting both Federal law based claims as well as State law-based claims, arising out of the same transaction or occurrence.

Obviously the problem would be increased somewhat if you had to apply Federal product liability legislation to certain claims in a case, while other claims would be governed entirely by State law.

I think that is something that our courts deal with regularly, anyway, and could deal with, if they had to, in this situation.

Senator McCONNELL. I disagree. I think as a practical matter, what you are going to promote here is even greater injustice, because what is going to happen is, that the jury is looking around for some way to make an injured plaintiff happy, are going to pick out the defendant without a limit and "sock it to him," and I think that is one of the strongest arguments I can think of—if the goal here is to provide equity and fairness across the board for the Nation's personal injury system. It seems to me that there is a very, very strong argument to be made for drawing some parameters beyond which courts and juries, even in State courts, may go in these kinds of cases. If what we are looking for is predictability, equity, and fairness throughout the system. And I think, Mr. Willard, that is the flaw, and the problem with the product liability only approach to tort reform in America.

Mr. Chairman, I have no further questions at the moment.

Senator HATCH. Thank you, Senator.

We will turn to Senator Heflin.

OPENING STATEMENT OF SENATOR HOWELL T. HEFLIN

Senator HEFLIN. Mr. Willard, I was a member of the Commerce Committee for, I believe, 6 years and I followed this legislation. In the Commerce Committee it must have been rewritten at least seven or eight times. There were all kinds of different approaches. At one time they even had the judge declaring punitive damages and the cause for which the punitive damages could be used.

I think it has a history of shoddiness in scholarship, in the draftsmanship, and in the concepts. As I look at the product, I see major constitutional problems with what came out of the Commerce Committee, and hopefully, those problems will be addressed, as well as the inconsistencies that exist in the legislation itself.

Frankly, the Judiciary Committee ought to be given some authority to rewrite this legislation since even the Department of Justice is now dissatisfied with the language involved in it.

But my major concern, my concern when I was on the Commerce Committee, and my concern still, today, is the issue of federalism.

I think I made a statement over there that every Federal cure turns out to be a Federal plague, and that the pendulum swings backward and forward.

I may be one of the few that still believes in States' rights that exist. But I was greatly elated on January 30, 1986, when I read the newspaper reports of the speech of the Attorney General of the United States, Hon. Edwin Meese, when he spoke to the Conservative Political Action Conference. At that time, he went into the issue of federalism. I have that speech before me and I just want to quote two or three items from it.

He is advocating that as a part of conservatism, there must be federalism, that it is bedrock. He says, "What we seek is not some old-fashioned notion of States' rights. Rather, we must seek to generate a belief in States' responsibilities and confidence in the States' ability to govern."

He goes into it, he traces it, and he says, for example:

> The toughest political problems deserve to have full and open public debate, whether it is the issue of abortion, pornography, aid to parochial schools. There is no constitutional, explicit reason, why the people within the several States may not deliberate over them and reach a consensual judgment.

And then he advocates, toward the end, he comes forward with, I think, a very succinct, timely, and important statement.

He says:

> Frankly, my view is that we ought to restore power and authority whether the States are capable of handling it, or not. The reason for restoring federalism is not because the States have somehow now proven themselves under the watchful parental eye of Congress and the Supreme Court. Federalism must be restored because it is a basic constitutional principle. Under our Constitution we have a political obligation to allow the States to govern themselves, hopefully to govern themselves well, but to govern themselves in any event.

And he then said that:

> This leads to four basic propositions we need to keep in mind as we go forward in the years ahead. First, to paraphrase Mark Twain, the reports of the death of federalism have been greatly exaggerated. Second, if we are to protect our most important constitutional values, then federalism must be preserved. Third, with a little innovation and a little creativity, federalism can be revitalized. And fourth—as he is speaking to the Conservative Political Conference: "With your enthusiasms and efforts it is inevitable that Federalism will be revived, and ultimately will be protected and preserved."

Here today, the Department of Justice is critical of this legislation, they state their reasons, but their reasons invade federalism even more than the Commerce Committee bill.

Has the Attorney General personally reviewed this legislation and put his stamp of approval on this?

Mr. WILLARD. Yes, Senator. I have discussed it with him on a number of occasions.

Senator HEFLIN. Then the Attorney General of the United States speaks with a forked tongue, I suppose. I cannot understand how a historical and traditional matter such as the tort system of the United States has been vested in the past, exclusively within the jurisdiction of the several States, and yet you advocate "nailing additional nails in the coffin of federalism."

Can you give me any explanation for the inconsistency between those words of the Attorney General and his approval of your position that you are advocating today?

Mr. WILLARD. I will try to do so very briefly, Senator. I could go on at some length and would be happy to provide as much detail as you would like.

In our view, the Constitution, and the values of federalism are not simply simpleminded States rights, but instead involve an allocation of responsibilities in the constitutional scheme, some to the National Government, some to the State governments.

One responsibility allocated to the National Government, specifically to Congress, is to promote interstate commerce. Our analysis of product liability law led us to believe that tort liability imposed by State courts was creating an excessive burden on interstate commerce.

A manufacturer in one State who makes a product cannot control where it is sold. Ultimately, products are sold throughout the country, and yet these people can be held liable under the standards of the States where the product is sold, or used, or caused an injury. This can, and does, have an effect of chilling commerce by forcing products off the market because of excessive liability. This is not something that a State, individually, can address. For example, a manufacturer in the State of Florida, cannot be protected from product liability by legislation passed by Florida, if the manufacturer's products are sold in other States.

For that reason, we believe that there is a justification for a limited kind of Federal legislation that would limit the amount of tort liability States can place on products in interstate commerce.

Now I realize the interstate commerce clause has been used to cover a multitude of sins, including making it illegal to grow wheat on your own farm for your own consumption. But in this case we think that the legislation we proposed is within what the commerce clause was originally intended to permit.

Senator **Heflin**. Well, I must say that your answer is no different from the answer that "knee-jerk liberals" have given for every Federal cure that has ever been advocated, or placed before this Congress; and I think if we could get a record, and if similar questions were asked, that the answers given would almost be parroting what you have said today—or perhaps you were parroting what was said to them at that time.

It goes back to the old concept of interstate commerce, and I think that somebody has even held that if anybody uses a restroom in a building in New York City, where the refuse floats into the waters, that somehow it affected what happened in California. So, the concept of the interpretation of interstate commerce is in need, but it is intriguing to me, that here we have a speech to a great conservative group—and I must say that at the time, I thought it was a courageous speech because it was given to those that were advocating the Federal cures for everything that he mentioned.

He did not get into the toilet thing, but I thought it was a courageous speech. However, I must say that I think that the Attorney General has his arm, and his hammer, and he is nailing additional nails in the coffin of federalism and States rights. That is all I have.

Senator **McConnell** [presiding]. Senator Simon.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator **Simon**. Thank you, Mr. Chairman.

First, just a general observation. I happen to think that some type of Federal product liability law is desirable. However, I think any progress in this area is going to have to be incremental.

I think this bill is doomed to defeat, and we are just going to hear a lot of speeches about it. Though I don't foresee any action on this legislation, I believe we should have the will to move toward substantive change.

Second, you talk about your working group. What is this working group? Who are they?

Mr. **Willard**. The Tort Policy Working Group was set up as an interdepartmental group under the Domestic Policy Council. It included representatives of about 10 Federal departments, or agencies, that participated in producing the report, which has been issued and publicly released in February of this year.

Senator SIMON. And who did you feel you had an obligation to serve in that working group?

Mr. WILLARD. The working group was purely an internal deliberative group within the executive branch. It did not involve participants from outside. It was a policy formulation and recommendation group for the administration, and our report ultimately went to the Cabinet and the President.

Senator SIMON. But you did not answer my question.

Mr. WILLARD. Well, you asked who was——

Senator SIMON. My question was, Whom did you feel obligated to serve? Were you just serving the administration, or were you——

Mr. WILLARD. That is correct, Senator. The President.

Senator SIMON. I was interested in your response to a question from Senator McConnell on data. One of the things that has struck me, as I have looked at this whole liability question, is the great difficulty in getting adequate data.

You say you had too much data. How carefully were you looking?

Mr. WILLARD. Well, what I tried to suggest is that there is a large amount of data out there about this problem, and I think the problem is not so much collecting new data——

Senator SIMON. Yes. I would agree that there is a large amount of data out there in 50 States, some of which collect it adequately, many of which do not collect it adequately.

Interestingly, Senator Javits, just about a decade ago, was working on this very question and said, "It's just tough to get adequate information."

For example, are you aware that some insurance companies, when they list their securities, list them at purchase price, and some list them at market price, giving vastly different kinds of information about what their status is?

Are you aware of that problem?

Mr. WILLARD. I am aware of that issue, and the question of whether or not unrealized capital gains should be considered. One reason for the differences is that there are different regulatory standards for gathering data supplied by the different States. This is one reason why we think that the authorities that do the regulation are in the best position to gather the data, because they can develop what are the appropriate standards for gathering the data.

Senator SIMON. The United States is the only western industrialized country which does not have a national system of insurance regulation. I should say here that I am not an advocate of Federal regulation of our insurance industry. Don't you think we should consider gathering information on a national level so we know what we have? Why just leave it up to 50 States to gather, or not gather the data, and set their own standards?

Mr. WILLARD. Well, I think that there are bodies that do compile nationwide data on the performance of the insurance industry.

Senator SIMON. I am talking about insurance companies.

Mr. WILLARD. There are companies that compile and aggregate the data. The kinds of questions that I have seen raised about data really go more to interpretation than they do to the absence of raw information.

The question about whether you should recognize unrealized capital gains——

Senator SIMON. But the data that you are talking about is gathered by the insurance industry, is that correct?

Mr. WILLARD. The nationwide aggregation is. There are some independent companies that do it also, I think F.M. Best, and others.

Senator SIMON. But do you think that the Federal Government maybe should be pulling together information, so we can know where we are in this whole area?

Mr. WILLARD. Well, as I said before, Senator, it is really hard to be against gathering information. I do not want to overstate my opposition. I do not think that it would be a terrible thing to gather the information. It is just that I do not think it would be terribly helpful, because the disputes that have occurred about this problem have dealt more with how you interpret the data, rather than what the raw data show.

Senator SIMON. OK. Then let me shift to one other thought, and then I will yield to my colleague from Delaware, who has slightly more seniority on this committee than I do.

When you get to discussing McCarran-Ferguson, you say while the working group did not review and takes no position on the continuing validity of the industry's antitrust immunity, it is readily obvious that the suggestion that allegedly excessive competition can be cured by even more competition is absurd.

What you are saying in this statement is that you did not review the information, you are taking no position, and then, in the same sentence, you take a position.

Now let me read from a speech given at the American Bar Association convention in New York by the Chairman of the FTC, Dan Oliver, on August 12, about 3 weeks ago. He says,

> Trade restraints are not the only way the State thwarts competition. Congress, for example, has enacted various statutory exemptions to the general antitrust laws for certain special interests. We hear a great deal these days about an insurance crisis. Well, I wonder how much of the crisis would be solved by market forces, if entry into the insurance market were made easier. The McCarran-Ferguson Act largely exempts the business of insurance from the antitrust law. That exemption, together with State regulation that precludes entry into the insurance industry, make it less likely that the insurance crisis will go away. Perhaps the time has come for repeal of the McCarran-Ferguson Act.

This is the Chairman of the FTC.

Any observations about his comments before the ABA?

Mr. WILLARD. As a general matter, I do not think that the Department looks favorably on special industry exemptions from antitrust laws.

We have not been asked to comment on a specific piece of legislation dealing with the McCarran-Ferguson Act. If we are asked to do so we can comment in more detail because some of these issues are kind of complex.

As a general matter, though, we think there should be competition in the insurance industry.

The point I was trying to make in that footnote, which, I realize is somewhat bureaucratic in its wording, is that we think there already is a great deal of competition in the insurance industry, notwithstanding the exemption.

There are thousands of companies in the insurance business. The Antitrust Division has looked at the insurance industry and found it to be a very unconcentrated industry. I am not sure therefore, that repealing the McCarran-Ferguson Act would make much difference. But we would be happy to look at a specific proposal and comment on it.

As I indicated, we do not normally look favorably upon special industry exemptions in the antitrust laws.

Senator **Simon**. Well, you are being asked to do that right now, and if you could give me your reaction, I would appreciate it.

Mr. **Willard**. Could we have a specific bill because——

Senator **Simon**. I will give you a specific bill, and I would appreciate having your reaction to it.

Mr. **Willard**. We would be happy to provide that, Senator.

Senator **Simon**. All right. Thank you. Thank you, Mr. Chairman.

Senator **McConnell**. Senator Biden.

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator **Biden**. Thank you, Mr. Chairman.

Welcome, Mr. Willard. I think this whole area is obviously important, and somewhat confusing, and I respect your attempt to deal with what is in fact a genuine crisis. Genuine in the sense that small business people—roller rink owners and wheelchair manufacturers, and people who run junkyards, et cetera, are in serious dilemma, in that their insurance rates are being raised so significantly, that their ability to continue to stay in business is either jeopardized, or eliminated. And so there is a problem. You have obviously—when I say "you" I use it in an editorial sense—you, the administration, have obviously concluded that the source, the overwhelming reason for the problem, as I understand it, is the tort system, and unprecedently large awards on information that is skeptical. I listened to the acting chairman talk about these outrageous awards and basically indict the jury system, which I found fascinating.

And there are others who suggest that—and I admit I am one of them—that more than half the blame lies with the insurance industry's greed.

I find it somewhat interesting, that most studies I have read indicate that the insurance industry at the time—by the way, they had about a $7.6 billion profit from areas other than their writing insurance—that they were actively competing with abnormally low premiums for access to business, so they had access to capital to invest in other areas.

And now, having done that, they want it both ways from this Senator's perspective. They wanted to make that business judgment, to go out and do it that way, and it worked. They made a lot of money in noninsurance related industry areas, and now they want to come back and make the insurance side of their ledger, balance, if you will, a profit must be shown there, and rather than looking at the totality of what the insurance companies have made from purely investments in—the risks they take in providing insurance and investments they make in Zimbabwe, or housing, or anything else.

But the bottom line of it all is, to use that trite Washington expression, the American people are angry and they are confused.

And I am not suggesting you have done this alone. It is awfully easy to ancedotally make one's case. I should also note, parenthetically, that Senator Simon is right—there will be no bill this year. I can almost guarantee that.

And I seldom if ever have attempted to guarantee anything. There will be no bill this year.

But there will be, and must be, some action taken on this issue because the end result is that that main street merchant needs help, and needs help, in my view, somewhat badly.

So let me explore with you, if I may, a couple areas of concern that I have, and then on a second round of questioning, although I have to—there is a drug conference at 11:45. I may not be able to stay for a second round, but I no doubt will get to do this again next year.

One of the things that—and if we can deal with what I believe—and I am going to be presumptuous to suggest that I understand, as we all think we do, what the public concern is in this area.

I am always reluctant when my colleagues—none of whom have said this this morning—but when colleagues in the House and the Senate say, "This is what the American people want." I do not know what they want. I cannot speak for all the American people. But I have spoken to enough people in my State to understand what I think are at least some of the broad concerns.

And everybody knows them. But let's go through and see how your bill would cure, or impact upon their concern. The biggest concern is the amount of money they are paying for insurance.

Now do you have any evidence that limiting pain and suffering to a $100,000 recovery will lower insurance rates?

Mr. WILLARD. Senator, there is evidence. There is a study cited in our report, that a substantial amount——

Senator BIDEN. Which study is that?

Mr. WILLARD. It was the Florida Medical Association study cited in our report, which shows that a substantial amount of money that is actually awarded in jury verdicts is in the form of pain and suffering awards in excess of $100,000.

So the first step of my answer would be to say, I do believe that kind of limitation would reduce the amount awarded. The second question——

Senator BIDEN. There is no question it would reduce the awarding but obviously, the law——

Mr. WILLARD. The second question obviously is, would those savings be passed on in the form of lower premiums, or would the insurance companies just grab the profits and keep them for themselves?

The answer is there is good evidence to suggest that they would be passed along because of the competitive nature of the industry.

Senator BIDEN. Why is it?

Mr. WILLARD. As you indicated yourself, Senator, a few years ago we had excessive rate cutting by insurance companies because of competitive pressures. I think those competitive pressures are still there.

So if costs go down, that rates would also tend to come down as well.

Senator BIDEN. In all the cases that are tried, do you have any estimate of what the total number of awards over a million dollars are in personal injury cases?

Mr. WILLARD. It is hard to know the precise numbers. There is a recent study by the Rand Corporation's Institute of Civil Justice, that does show that the frequency of those awards has increased in recent years. What I think is more significant, however, is the amount of money attributable to such awards is accounting for a larger and larger percentage of the money that is awarded. In this Rand study, they found that in the 1980's, the first half of the decade, million-dollar awards were less than 4 percent of the total plaintiff verdicts.

Senator BIDEN. Is this in Federal court, or all courts?

Mr. WILLARD. These are in all State and Federal courts. Rand found that the million-dollar awards were less than 4 percent of the awards, but accounted for two-thirds of the money awarded.

So, I think that there is some evidence that while million-dollar awards are fairly unusual, they are so large that they have a skewing effect. Thus accounting for a very large amount of the money awarded.

Senator BIDEN. Would it surprise you to learn, that there have only been 1,642 awards over $1 million in the last 14 years, and for over two-thirds of those, the people who were awarded $1 million or more were permanently paralyzed, brain-damaged, or had amputations, or death?

Would that surprise you, that figure?

Mr. WILLARD. No, Senator.

Senator BIDEN. Does that seem unreasonable to you out of a population of 240 million people?

Mr. WILLARD. To the extent that some of the awards reflect amounts for pain and suffering, some of those are in fact excessive, because they are totally unpredictable.

One jury might award $50,000 for pain and suffering and another jury $5 million for the same kind of injury.

Senator BIDEN. Well, isn't that the same thing the jury system does in murder cases? Some juries aquit on the same evidence that other juries come back and convict?

I mean, are you suggesting we change the jury system? Is there something fatally flawed in the jury system?

Mr. WILLARD. No, Senator, I think the jury system is good for determining facts. The problem occurs when a jury is asked to determine pain and suffering, it is such a subjective inquiry. Other elements of damages, for example——

Senator BIDEN. Well, who should make that judgment?

Mr. WILLARD. We think the legislative bodies should: Congress or the State legislatures should impose some limits on what can be awarded in those cases.

Senator BIDEN. Do you think we are better able to determine, by an arbitrary number, whether or not someone who has suffered pain and suffering, should get that number, or less, or whether or not a jury who sat through 2, 3, 4 weeks of a trial, looking at the evidence, and at the plaintiff—you think that we are better equipped to do that than 12 women and men sitting in a box under sworn oath, as to whether or not they make the judgment?

I mean, how are we better equipped to do that?

Mr. **Willard**. I think you are, Senator, because in individual cases, juries can be swayed by some irrelavant fact of the particular case, or the emotions, or how the case is presented by the lawyers. This causes juries to lose sight of the ultimate consequences of the way the awards have to be paid.

Senator **Biden**. Isn't the reason why they are in the courtroom, the ultimate consequence is the right of the plaintiff and the defendant? That is the ultimate consequence, not the money. The ultimate consequence is whether or not under our English jurisprudential system, someone has a right to go into court and have their claim adjudicated.

I am concerned, as Senator Heflin, that we sort of got this thing—talking about skewed—we have a problem here, but what we are doing is, we are basically attacking the fundamental essence of the system.

Here you are saying that 535 women and men sitting in Washington, DC, are better able to determine what pain and suffering award should be given to someone in Oshkosh, than 12 women and men from Oshkosh who sit there for 4 weeks and watch what happens, and make judgments about what happens.

You are further suggesting to me that the ultimate concern should be, for us, not protecting the right of that person to go in and recover, but whether or not the insurance company has a premium requirement that will be so high, that it will impact upon whether or not someone can stay in business.

I mean, I kind of thought it was the other way—I mean, if you are concerned about that, why—let me ask you this: why shouldn't we—if that is the concern—why should we be here in fact underwriting insurance premiums? I mean, if the concern is whether or not people are going to be able to get insurance, they are going to be able to stay in business; whether or not insurance companies are going to be able to guarantee that they have insurance, why shouldn't we be sitting here? I am not suggesting it, but why did you dismiss, on the one hand, that we go in and directly, directly underwrite—as we do many other places, like we do for the nuclear industry and the insurance policy—taxpayers pay for Three Mile Island's insurance. You understand that. I understand that.

Why shouldn't we go in and do that instead of saying that Mitch McConnell who does not know a "bloody thing" about Mrs. Schmedlap who is totally paralyzed in Oshkosh, whether or not she is suffering, that he should be able to sit here and make a decision that she cannot collect more than $100,000? If we are going to be so concerned—if our concern is the system continuing to function, why go in and trade those judgments for the judgment that says we are going to make a decision? The business of America is business, we have go to keep it rolling, people have to be insured, so let's go in and subsidize it through Federal funding.

Mr. **Willard**. Senator, I think that the traditional separation of roles between the jury and the legislative branch dictates that the legislative branch create policymaking law and then it is applied to the facts of a particular case by the jury.

Senator **Biden**. All right.

Mr. WILLARD. I think it would be legitimate, just as many legislatures create laws that create causes of action in court, and define them and limit them——

Senator BIDEN. Right.

Mr. WILLARD [continuing]. To be involved in this area. Obviously, whether that kind of law is good as opposed to whether it——

Senator BIDEN. Oh, we've never done this before.

Mr. WILLARD [continuing]. Is legitimate is something that you can——

Senator BIDEN. I mean, look, we have never done this. If we go in and create a cause of action, to say that if in fact you go in and your employer, instead of—he says, "Now in order to determine whether to hire you, Miss, let me run my hand up your skirt." We have created a cause of action relating to that. Harassment; civil rights; civil liberties. We went in and created a specific cause of action where States have deemed to suggest they do not exist.

But we have not, in turn, gone in and taken the essence of the jury system, which is to determine, (a), guilt or innocence, culpability, or lack of culpability, and then make a just award.

A just award from their perspective, whether it is to make—in courts of equity—to make the person whole. A judgment of what constitutes making them whole. Look. I just think——

Mr. WILLARD. Could I answer, Senator?

Senator BIDEN. Sure. Please.

Mr. WILLARD. I just want to suggest that this does happen sometimes. For example, in the areas of workers' compensation with regard to maritime jurisdiction and railroads benefits, State legislatures and the Federal Congress have passed laws interfering with the common law recoveries for people who suffer on-the-job injuries. So there is some precedent for legislation that would deal with these kinds of issues.

Senator BIDEN. Now, are you willing to do that? Then we can talk a different ball game. I am prepared to do that, if that is what you are willing to come back and suggest. I think that is reasonable.

But here you are coming in and taking the one thing that is totally subjective. We have had studies. We have had doctors. We have had psychologists. We have had attorneys. We have had professors who have come in, in my State, and at the Federal level, and say,

> Now look, the reasonable award based upon the loss of an arm is "*X*" number of dollars. That is a reasonable award because it impacts upon the ability to do a job to this extent and the earning capacity, and so on and so forth.

But we have not come along and said, "By the way, we are going to put a measure on whether or not you have suffered pain and suffering to such an extent that you cannot recover for it." I mean, we are not in the business of, have not heretofore been in the business of determining how you put a value on that.

And what I want to get back to is this issue, who are we protecting? What is the interest we have? And it seems to me, the interest I have in this—I acknowledge my interest—is to keep the Main Street businessman in business. That is my interest.

Now the way to do that, it seems to me is, there are much better ways to do it than going in and making an arbitrary judgment about pain and suffering, which I will bet you, if I end up losing this fight next year, that in fact it will not positively affect insurance premiums. Because in fact I do not know how it does.

If you look at the numbers for the other studies—for example, you talked about in your—you know—you cite the Rand Corp. study, but there is no mention of the task force report of some important facts that the study points out, namely, that punitive damages are highly concentrated in intentional torts and business contract torts.

That punitive damages are infrequently awarded. That punitive damages are so rare in other types of cases that they are unreliable as an indicator of a trend in litigation, and that punitive damages are very likely to be reduced appellate courts. You cite a figure of product liability cases up 758 percent. Well, that is in the Federal court system. Can you tell me what percentage of product liability cases are in the Federal courts as opposed to the State courts?

Out of the total Federal product liability cases, what percentage of them are in State court? I mean, in Federal court?

Mr. WILLARD. I do not know, Senator.

Senator BIDEN. And yet, there is a State study showing that product liability in State courts, since 1978, is up 10 percent, which about parallels what the population increase has been.

And unless I am mistaken, unless someone can give me evidence to the contrary, it would be that the overwhelming percentage of product liability cases are at the State level, and a very small percentage at the Federal level.

You know, Disraeli once said there are three kinds of lies: lies, damn lies and statistics, and I think you very—I mean, you know, you are making your argument and you have a right to make it, obviously, and you make it well.

But I do not think we have all the facts here. Civil cases stemming from business disputes, in fact, over the last 4 years, have declined 10 percent.

This notion that we are the most litigious society in the world. I was out, I made a speech, I say to my friend, the acting Chairman. I made a speech out at—I do not know how I got there—but the University of Iowa, and to the law school.

Senator MCCONNELL. There is nothing going on in Iowa——

Senator BIDEN. Nothing going on in Iowa now except the farm crisis that has been brought on by this administration's policies. But at any rate——

Senator MCCONNELL. You did not say that while you were out there, did you?

Senator BIDEN. I did not mention it. I was talking to the law school, and I stood up, and I made, 5 months ago, the case that I have been reading, which is that—I used the phrase, "We're the most litigious society in the world." I thought that to be true. I was believing the press.

Then I was sent four different studies, which point out to me—and I would like to know if there are any studies to the contrary because this is a question—pointing out that it just ain't so. That in fact we are not the most litigious society.

England, Australia, New Zealand, Canada, all are equally as litigious or more litigious than we. So this notion that we are somehow this overwhelmingly litigious society just is not true.

I started off being for you all, and then I found out about the insurance companies, as to why they had lowered their premiums and how much profit they made overall. I wonder if the American public knows. If I am not mistaken—and I ask staff to correct me—that the insurance industry during the same time frame that is cited in your study, they in fact had a profit of over $756 billion. Is that correct? Excuse me, $7.6 billion. I am used to dealing with Federal numbers; $7.6 billion. That was profit.

And I believe the losses relating to the insurance portion of the business was $25 billion. Let me get this straight. All right; $33 billion in total income, $25 billion in losses, for a net profit as an industry of somewhere around $8 billion.

Now, the way I get this, I believe the public out there thinks what I thought from reading U.S. News & World Report and Fortune and, you know, well, the Wall Street Journal, that in fact these companies were all going under, that no one was making any profit, that they were losing money net, you know, in a big way; that we were the most litigious society in the world.

I believe by the way—you know, I remember reading that case about the guy who sued Sears, the lawnmower, you know, if you pull the lawnmower, you got a heart attack. I thought this is ridiculous, what is happening here. Then I went and found out about the facts. The facts are the guy was 32 years old, he had no history of a heart condition. It took him 15 times to pull the darn thing, which was advertised not to do that. It brought on a heart attack, he died. I had it read to me as an overweight, obese, older guy, going out, trying to cut the lawn when he should not; pulling this lawnmower twice and gets a heart attack and sues Sears. And poor old Sears, because of their deep pockets, is in real trouble.

Anyway, I am concerned that we do not have the facts. I am concerned that we had better darn well do something because small business people in this country are in trouble, but that the target of our affection at this moment, which is to change the tort liability system, limitate its suffering will, even if we do it, have no impact upon their ability to stay in business, will not help them a bit, and will fundamentally impact upon an aspect of our English jurisprudential system that will be very dangerous.

I yield the floor and will come back for questions.

Senator McConnell. All right. Senator Grassley gave up and left. I might suggest we spent an hour and a half on the first witness. Senator Biden, the insurance industry will be represented tomorrow. You might raise those questions about its profitability with them.

I want to thank Mr. Willard for coming. Senator Metzenbaum has an opening statement he did not make earlier.

Our next witness is Charles Brown, the attorney general of West Virginia, and I would like to ask him to come forward while Senator Metzenbaum makes his opening statement, and then we will go straight to Attorney General Brown.

Senator Metzenbaum.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. Thank you, Mr. Chairman.

I find this hearing to be particularly interesting, and I think, before we get done, it may be a little bit helpful, but I agree with others, there will be no legislation this year.

I think we can all agree there is a crisis in this industry. What I do not think we can agree is exactly what that cause is. There are plenty of places to put the blame. We can put it on the lawyer, plaintiff's lawyers; we can blame the jury system; we can blame irresponsible insurance company underwriting and poor investment decisions; we can blame litigious consumers. And when we get all done, we will find that there are no simple answers, and the fact is that you need facts in order to responsibly legislate.

The whole issue with respect to this matter of whether the Federal Government should do it or the State government is a rather interesting one. We are all aware of the fact that after the Supreme Court had acted, the insurance industry came to Congress and asked them to pass the McClure and Ferguson Act, and they did that, and sent responsibility back to the States. In that instance, they did not want Congress to be involved.

And then, in 1979, the Federal Trade Commission was moving on this very critical issue in order to obtain the necessary information about the insurance industry. And the insurance industry mounted an extremely effective lobby to get an amendment passed on the floor of the Senate, which I fought vigorously, to keep the Federal Trade Commission not from doing anything more than just studying and finding out the facts for it. And I regret to admit that the insurance industry was almost 100-percent successful because the net result was that we provided by compromise that the FTC cannot do anything on its own without a request from Congress, either the Commerce Committee in the House or the Senate committee. And three times the House committee has requested some investigation be made and some facts be made available. Regrettably, in no instance has the Senate Commerce Committee acted on the subject.

But we do find this reversal of position of the insurance industry not unique around here, sometimes asking Congress to act, sometimes saying Congress ought to keep their nose out of our business.

But the fact is that the insurance industry today says it is bleeding and they do not give us any credible evidence. They give us newspaper and TV ads and, interestingly enough, Senator Hollings indicated that much of the information that the task force had that Mr. Willard speaks about, based their conclusions upon newspaper ads. It is hard for me to believe that to be the fact, but that is the statement which he made and is to be found in the congressional report on it as the bill came out of committee.

Generally speaking, the insurance industry refuses to provide data on premiums collected and actual claims paid by class of coverage. It is an incredible reality in this country that probably the largest single industry having a concentration of wealth and the ability to have such an impact upon our total economy is so unwilling to provide us with the facts and data, and we in the Congress have been irresponsible in coming down hard enough on them in order to see to it that we can find out what this industry is all about. But what the devil.

We all buy insurance policies day in and day out, and we beg our insurance advisor or insurance agent to get us the policy, and then when we get it, there is not one of us, no matter how much training we have had in the legal profession, who can totally understand what we bought after we bought it because it is written in such convoluted language.

So we find the insurance industry selling a product that nobody can understand, and then giving us figures that nobody can understand either.

They have incredible gall to come here and demand relief and refuse to provide us with the facts. But the available facts that we do have before us undercut much of the industry's claims.

In the medical malpractice area, for example, in 1984, the estimated loss in expense payments increased by the smallest margin since 1977. Yet the premiums rose by the greatest margin since 1976.

Day care providers are a common casualty of the liability crisis. We hear constantly about day care centers being forced to close down.

There was an organization known as the National Association of Education for Young Children. It made a study in 1986, a very recent study; a survey of more than 200 child care providers revealed 9 out of 10 programs had never had a claim against them since the beginning of their operation, and that the total claims paid off by the insurers for all programs since they began operating amounted to only 6 percent of the premiums paid by the programs in the 1984-85 year alone. We need facts, not rhetoric.

Before legislating in the dark, we should see data for each classification of business insured, listing premiums collected, claims paid, administrative and legal costs, reserves, and investment income. As a matter of fact, I side with those who say: what are we in this field at all for? Why is this not a State's rights issue? But if we are going to legislate in this area, then we ought to legislate with some brains and some knowledge rather than with just the propaganda that we have received so far from the insurance industry.

This bill is nothing more than an industry wish list. It is grossly unfair to the victims, and it is indifferent to the need for more stringent controls on the insurance industry.

It says to the injured party that he or she can never get more than $250,000 for pain and suffering. Is that enough for someone suffering excruciating pain, sleepless nights, loss of limbs, inability to bear children? Is it enough for that little child about which I spoke previously that will never have a peaceful day the rest of his life? And what about the parents and their responsibility and their ability to defray the expenses of caring for that child?

Under this bill, a victim with a lesser life expectancy than that child, a victim with a 40-year life expectancy can anticipate receiving the magnificent sum of $17 a day, less than a dollar an hour. It is an affront to equity; it is an affront to dignity; it is an affront to fairness. And Congress has no right to put a price on human misery.

Bill sponsors themselves acknowledge that the current, not the future, the current tort system underpays people with the most serious losses. Now, I am prepared to sit here and admit there is a real problem. But do not take it out on the victims, do not use our antipathy, not mine, but some, antipathy to plaintiff's lawyers to foster a one-sided result. We know there will be no bill this year. Several members of the Senate have already indicated they will oppose it on the floor, and I will join them.

Over the last 18 months, there has been an effort to develop a compromise. It has failed. If we are going to be called upon in Congress to legislate in this area, it is necessary that we develop that kind of compromise. And I would say that I am prepared to help. I am prepared to work in that area. We ought to consider expanded risk retention, and, yes, we ought to consider, and I will join with Senator Simon as previously indicated, that I will introduce legislation to repeal the antitrust exemption for the insurance industry.

There ought to be alternative dispute procedures, but we cannot do anything. I say to the insurance industry do not come before us next year again and ask us to act without being willing to provide us with all the facts.

I remember that TV program some years ago where I think the punchline on it was "just the facts," just the facts. That is all they wanted. We want just the facts before we are called upon to deny individuals rights to which juries have indicated heretofore that they are entitled.

Thank you, Mr. Chairman.

Senator McCONNELL. I would like to note the presence of Senator Specter and Senator Grassley. And Senator Grassley has an opening statement which I would like to place in the record at the appropriate time.

We have now spent 1 hour and 75 minutes , and finally got to the second witness—1 hour and 45 minutes, all right—Attorney General Brown of West Virginia.

Mr. Brown.

STATEMENT OF HON. CHARLES G. BROWN, ATTORNEY GENERAL, STATE OF WEST VIRGINIA

Mr. BROWN. Thank you very much, Mr. Chairman.

Senator McCONNELL. If you would summarize your statement, we would appreciate it.

Mr. BROWN. I would be happy to do that.

I am a last second replacement for Attorney General Bellotti of Massachusetts, who was to appear here. I am very honored to be before the Judiciary Committee today.

As attorney general of West Virginia, I want to state my adamant opposition to federalizing our tort system. We have an effort here that is more than trying to resolve conflicts in State laws. The State laws are roughly similar in the tort area. The advances that are made in one State generally are followed in the ensuing years in other States.

What is really going on here is a victory that has not been able to be won in the State legislatures. The effort is to advantage the manufacturers over the victims in the courtroom of a perceived imbalance that does not in fact exist. Basically it would cut at the core of the uniquely valuable American institution, the jury, in our civil law system.

Let me just outline briefly what happened in West Virginia this year. It may be instructive of the problems that citizens in our State are having and that other States are having with the insurance industry.

After our legislature passed a mild tort reform law in 1986, a law that was partly what the insurance industry wanted and partly something they opposed, the major malpractice companies instituted a mass pullout from the State, a simultaneous pullout of malpractice insurance. We came in fact within 48 hours of having clinics closing, having the only ambulance service in one county closing down, the only renal dialysis unit in southern West Virginia closing down, clinics shut down if the malpractice companies had succeeded in their effort to pull out.

I filed a civil antitrust case in State court against these five companies and got an injunction in our State supreme court stopping the cancellation of 7,600 policies so the insurance stayed in effect.

The legislature came back to town. The situation was so bad that our Governor proposed even a State-run insurance company basically booting out the insurance companies permanently in malpractice and have a State-run system. Our Republican Governor, I might add, proposed that. The legislature instead took a more proinsurance position and simply passed the proposals that the insurance companies wanted essentially.

We undertook then—my office undertook a study through an economist, a Washington economist, to the profits of the insurance industry in malpractice, because they were claiming they were losing money. We found the profit picture to be astoundingly helpful to the insurance industry. The two major insurance companies were making 58 and 73 percent respectively in rate of return over the last 6 years. Two of the smaller companies indeed made 200 percent rate of return, but that may be a smaller data base. But the two largest companies made an incredible rate of return, 58 and 73 percent.

Interestingly, when I intervened in one of those rate increase requests a couple of weeks ago, we had the hearing. The insurance company was asked what in their rate proposal took into account the tort reform passed by the West Virginia Legislature. And their answer was they had not taken tort reform into account at all. That is, there was no quid pro quo at all for the businesses, for the consumers, in this case the doctors and nurses and dentists, who had expected tort reform to lower their insurance rates. Instead, the cavalier answer of this insurance company representative was, "We didn't take into account tort reform at all when we asked for this 130 percent rate increase in 1986."

So we have had a real difficult experience in West Virginia with the malpractice insurance industry. Perhaps a unique one in one sense that there was a mass pullout attempt.

Now, my fundamental question here to the committee is why must this so-called crisis be solved by the victim bearing the brunt, indeed the victim bearing the entire burden of the problem? The $100,000 cap or, in Senator Danforth's proposal, the $250,000 cap, which so much limit the case of the administration bill would basically rule out punitive damages. It would not be that deterrent that we look for to have more safety in the workplace and safety in the environment.

Victims are no longer made whole for noneconomic losses. If the victim would have something valuable to stow on a piece of property, he could be made whole on that, but he or she could not be made whole for the noneconomic losses.

We certainly have, and I certainly would concede there are some real unusual, perhaps even outrageous anecdotes of people getting very high verdicts in particular cases. But they are anecdotes. They are not the aggregate data. And the aggregate data do not demonstrate the need for massive changes in the way insurance companies are able to act in our society.

Now, there is a solution. And I know all the members of the committee are lawyers, and there is a solution in the common law to outrageous jury verdicts or runaway jury verdicts. And that is the concept of remitting it, where the judge says your verdict is too high, we will remit it down to reasonable level. And that happens in cases where the jury verdict is too high. That is the way the common law solves the problem when an individual jury gives an award that is too high. That is really the problem. The anecdotes are too high jury verdicts from time to time. There is no systemic or aggregate data problems that I have been able to see.

We have to not only look at the impact on the victim; we have to look at the impact on safety. If we decrease the incentive to bring product safety, safe products to our consumers, we will lower the quality of those products in terms of safety. Safety in the workplace and safety of the product to the consumers.

I do not think that is a good tradeoff, and I do not think there would be any positive impact in the way of lower insurance rates. At least our experience is the opposite.

My question of the committee—my final question is why does not tort reform lower insurance rates? The one State that did in fact command lower insurance rates when they passed tort reform, the State of Florida subsequently faced a lawsuit from the insurance industry because they had lowered insurance rates as a quid pro quo for tort reform.

If tort reform is not going to lower insurance rates, why have tort reform at all? There is no gain except to the insurance industry. Our analysis of this situation is they do not really need any help from the Government at this time and have not for several years.

Let us get the data first. Senator Rockefeller of my home State has proposed in the Commerce Committee bill that there be aggregate data reporting. That would be important. In fact, Senator Simon, I believe, has a bill to that effect, and I really commend that.

The committee could also, in the insurance area, repeal the McCarran-Ferguson act. While attorneys general, the 50 of us, disagree on a lot of things, we are unanimous in agreeing that the McCarran-Ferguson act ought to be repealed. Republicans, Democrats from all regions, from all philosophies agree that we should repeal McCarran-Ferguson and make the insurance industry compete in the same terms that most industries in America had to behave.

The committee may have—if it does not, I would be happy to submit it—a report that six attorneys general have written. This is not the association, but six of us: Bellotti of Massachusetts; Van de Kamp of California; Mattox of Texas; Thornberg of North Carolina, and LaFollette of Wisconsin, and myself, on the issue of the insurance problem and our belief that it is more of an insurance crisis than a tort crisis.

We do have to act, we do have to bring down the cost of litigation in the courtroom. There are many changes that we need to bring. But let us not have the victim pay the price. Let us look at the other participants, the insurance industry itself, the lawyers, not only the plaintiffs' lawyers, but the defense lawyers, the medical, the health providers. When we look at jury verdicts going up so much, as is alleged—and I do not think they are that much more than the cost of inflation. But keep in mind the costs of health care have gone up much, much faster than the cost, have been inflation. If the cost of health care goes up dramatically, as it has in America for the past two decades, logically the jury verdicts that pay for those high health care costs are going to go up. Let us do something about high health care costs as part of this solution.

So, if we are going to have a solution, I think everybody has got to give, not just the victim.

Thank you, Mr. Chairman.

Senator McConnell. Thank you, Mr. Attorney General.

I have three questions, two of them I am going to submit to you to be answered in writing, if you will, for the record. I am doing that in the interest of time. But I do want to ask you one of them.

You mentioned the analysis of the causes of the current crisis of unavailability and unaffordability of liability insurance, and this Attorneys General study to which you are a signatory.

Mr. Brown. Yes, sir.

Senator McConnell. My question relates to that paper. It places the exclusive, the exclusive blame for the liability crisis upon the insurance industry.

So my question of you is: is there no evidence in your opinion, no evidence that inequities or uncertainties in our underlying tort liability system have played any role in even contributing to this crisis?

Mr. Brown. I think, Senator McConnell, there are problems in our tort system. I certainly agree with that. The cost of legal fees, the time of getting to court, the difficulty of lower income plaintiffs, particularly in smaller awards, those who are not injured that much may not even be able to get an attorney at all.

There are certainly problems, but the problems are more in the one-on-one type, not only the anecdotes but the individual harm to the consumer. I think the aggregate data indicates that the insurance industry should not be charging the rates they are.

But I would say, as one individual attorney general, that we should look at every aspect of the problem. I commend you for doing that, not just looking at the victim, but looking at the insurance industry, looking at the bar, the plaintiffs' fees and defense fees and the medical costs.

Senator McConnell. So some kind of tort reform might be appropriate regardless of the insurance liability crisis?

Mr. Brown. I think if we did it across-the-board, I think it should occur at the State level, but I think we should have no sacred cows in the system, and should look at the system as a whole. But I think our legislatures and our State courts are able to do that.

Senator McConnell. Senator Heflin.

Senator Heflin. You mentioned States—attorney general from the State, and the issue of federalism which concerns me.

Are you familiar with the bill that came out of the Commerce Committee? I assume it is S. 2760.

Mr. Brown. Yes, sir, Senator.

Senator Heflin. It seems to take a somewhat different approach than most Federal legislation that attempts to create a Federal cure. Most create Federal standards, and then place the responsibility in the Federal courts. There are some exceptions where they have been concurrent, such as the FELA cases, Jones act cases, that have in effect given the State courts concurrent jurisdiction with the Federal court.

This bill in effect does not give the Federal courts any jurisdiction whatsoever, but creates standards that are imposed on the State court system. And this, as far as I can ascertain, is something different.

In the cases that have been created relative to several recovery, several causes of action and the basis in the courts, you have had the Federal courts to construe then, the expense involved, or else the concurrent aspect, as I mentioned in those two exceptions.

Now, here you have an imposition and an intrusion into the State court system in that you are imposing on the State judicial system standards to follow, preempting and taking away right from the legislative branch of the States and saying that in determination of matters between citizens of this State as to civil cause of action, the State must follow these federally imposed standards.

This raises, to me, a question of constitutionality. I do not believe that our Founding Fathers ever attempted to say that in the three branches of government within a State, we were going to impose standards upon them relative to certain matters, and then not take into jurisdiction anything which will allow a judicial system to do it.

My thoughts are hazy on this. But it seems to me a substantial constitutional issue from the concept of the way the States were organized and where our Constitution is written and the way that the Federal and State relationship exists. I just wonder if you have any comments relative to that aspect which is seemingly something entirely different than I have ever seen in any so-called Federal cure legislation.

Mr. Brown. Well, I have not been a jurist like you have been, Senator Heflin, but I think it would certainly be one that should be researched thoroughly before it is posed. I would assume the administration has researched it and has come to a conclusion that it is. I have not seen any research from the States or from the attorneys general either way on that, but I do think it is a subject that should be carefully examined by the Congress.

Senator Heflin. I can tell there has been no real research done on this. The language of the bill says the district courts of the United States shall not have jurisdiction over any civil action pursuant to this act, based on section 1331 and 1337 of title XXVIII, other than they would have jurisdiction on diversity cases, but not on the Federal question itself.

So it appears to me that we—I have not seen any research on it. I have looked at this a little bit and also at the Constitution. And I think it is an area that could stand some study.

It may well be that it violates a constitutional provision guaranteeing a Republican form of government to the States. I would like you and your attorneys general who are interested in this question of federalism and the rights of the States relative to this, to look at this peculiar aspect, and I think it is a peculiar aspect. It needs some research that is different from any so-called Federal cure legislation that has ever been proposed before that I know about.

Mr. Brown. Well, thank you, and I agree with you, Senator.

Senator McConnell. Senator Broyhill.

Senator Broyhill. No questions at this time.

Senator McConnell. All right. Thank you very much, Mr. Attorney General.

Our next group of witnesses is a panel consisting of James Coyne of the American Tort Reform Association; John Curcio of the National Association of Manufacturers; and John Motley of the National Federation of Independent Businesses.

I apologize for the length of the hearing this morning. Apparently that was because there is a good deal of interest in the subject.

If you could briefly each of you summarize your statements, we will put your full statements in the record.

We will start with Jim Coyne.

STATEMENTS OF PANEL CONSISTING OF: JAMES K. COYNE, PRESIDENT, AMERICAN TORT REFORM ASSOCIATION; JOHN B. CURCIO, NATIONAL ASSOCIATION OF MANUFACTURERS; AND JOHN J. MOTLEY III, DIRECTOR OF FEDERAL LEGISLATIVE AFFAIRS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Coyne. Thank you very much, Mr. Chairman.

I would like to submit my entire statement for the record, and I would also like to present you something.

Frankly, I am very frustrated to hear today that there is no chance of this bill, or a bill like it, being enacted this year. Of course, that frustrates, all of us who are involved in the tort reform effort, especially the 400 associations that make up the American Tort Reform Association, representing 30 million Americans and the nearly 2,000 small businessmen at the White House Conference last week. As you know, that group overwhelmingly supported tort reform and specifically, I might add, this bill. In addition, this inaction frustrates, I am sure, the people across the country who look to the Senate for relief. And so perhaps in the spirit of that frustration, I would like to submit to you for the record, if I may, the first demerit badge. This badge was developed by the Boy Scouts of America. They are a member of the American Tort Reform Association. They developed the badge for us. I would like to present it to the Senate as the Senate apparently is unable to enact tort reform legislation this year.

Senator McConnell. I might say I share your frustration and, unfortunately, those who have declared it dead are not here to listen to you.

Mr. Coyne. Well, I know. And I am certainly not addressing this directly to you, Mr. Chairman, because I know what a strong supporter of tort reform you have been.

Very briefly, to summarize my testimony, we view this particular bill as an important first step to bring the issue of tort reform before the full Senate. We hope that it can be meaningfully amended in several important areas.

First of all, we think that the definition of fault based liability has to be clarified so that, in fact, manufacturers can get the same sort of relief that this bill provides meritoriously for product sellers.

Second, we think it is very important that the question of joint and several liability be confronted head on, and we would hope that this bill, or whatever subsequent legislation is brought forward, totally abolishes the concept of joint and several liability.

Finally, of course, we hope that this measure becomes broader than just a product liability bill, and that it also address the liability concerns of Americans in all walks of life, clergymen, teachers, small businessmen, nonprofit organizations, municipalities, as well as doctors, dentists, engineers architects and other professional groups.

The liability crisis is not one that was fabricated by the insurance industry. Those members of our society who self-insure and have no interaction at all with the insurance industry have the same exact problems with our tort system today as those who pay insurance premiums.

Furthermore, the cause, the underlying cause of the tort system must be laid squarely at the foot of the civil justice system itself. To listen to many of your colleagues today, you would be led to believe that there is no problem at all with a civil justice system where lawsuits can routinely take 7 to 10 years to be settled; where, in fact, a lawsuit continues in which a jury has been assembled every day for 3 years. That jury has been coming just to hear testimony, and it is unlikely that that case will be adjudicated before the end of this calendar year.

But, most of all, we think that the current judicial system is unfair to Americans whether they are Americans that depend on products, like the vaccines or the small airplanes or the stepladders that are becoming more and more expensive or unavailable, or whether they are the Americans who look to our private sector for jobs, and look to our private sector to provide those jobs in competition with other countries which do not have this unfair tort system.

What I am really asking this body to do is to stand up and to do what our Founding Fathers expected our legislature would do, and that is wrestle with the tough questions of the day. This is a tough question, but it is perfectly in keeping with the mandate of checks and balances that our Constitution expected this legislative body to undertake. It is your job, as our representatives, to provide a check and balance on a runaway judiciary system, not to just sit back and say, well, we will let the judiciary system take care of itself or let the trial lawyers take care of it for us.

We have to, the people who elected you have to turn to you to provide relief, and that is what we very much hope you will do today.

Thank you very much.

[Statement follows:]

TESTIMONY OF JAMES K. COYNE

PRESIDENT

AMERICAN TORT REFORM ASSOCIATION

Mr. Chairman, members of the Judiciary Committee, my name is James Coyne. I appear before you today as President of the American Tort Reform Association (ATRA). ATRA is a unique national organization of businessmen, association executives, professionals, consumer advocates and concerned citizens whose sole agenda is fighting the liability crisis, reforming the civil justice system and fostering the availability of insurance. ATRA, a coalition of 400 organizations representing over 30 million Americans, has been working hard to increase awareness and educate American citizens. Members include the Boy Scouts of America, the Red Cross, the American Medical Association, engineers, day care centers, big and small businesses, educational groups, local government entities and others.

We feel that the liability crisis can only be solved with basic tort reform, the only answer to curing what has become an insidious national disease. It would be easy to point the finger at one another as "the One" to blame, but there is no real answer with such an approach. The fact of the matter is that all segments of our society must work together to cure this disease called "litigation pollution". Indeed, during 1984, our state courts nationally were clogged with 16.6 million civil suits -- compared to Japan's 160,000. The American Civil Justice system, which our Chief Justice of the Supreme Court, Warren Burger, has for many years decried, is in danger of seriously damaging our way of life.

The most obvious threat of the current liability crisis is the high cost created by the tort system which is being passed on directly or indirectly to all of our nation's citizens. As a result of spiraling costs, access to needed services and activities is being restricted or is in danger of being restricted as insurance becomes prohibitively expensive or is eliminated.

The tort system today has more million dollar winners than the state lottery. You may think that the high awards you read about are aberations, but in 1984 the average product liabilty verdict was over a million dollars. Data from federal courts show product liability suits have increased 758% in the last ten years. ATRA is commited to reducing the frequency of many of these unjust and irrational lawsuits, lowering liability premiums, and lowering litigation expenses.

We have a two-pronged agenda. First, we have built a broad-based bipartisan public organization with the resources and capabilities to demonstrate to our nation's policy makers what has to be done. Many lawmakers hear only the voice of the Association of Trial Lawyers of America (ATLA). In fact, the multi-million dollar war chest they've raised to oppose tort reform demonstrates how their own self interests are leading them to ignore their duty to the public. Second, we have carried this effort to fifty state capitals this year. Tort reform will not come only by the efforts inside Washington's beltway.

I should mention another effort of ATRA which is geared to assist you in your efforts on tort reform. Within the next few weeks, every member of Congress and many state-level policy makers will be given a Legislative Resource Book on Tort Reform. This document, prepared by ATRA, contains a comprehensive analysis and recommendation for every facet of tort reform. We are confident that you and your staffs will find the Legislative Resource Book to be an invaluble asset in your further deliberations on tort reform.

Mr. Chairman, we are very pleased that Senate Bill 2760 has been reported by the Senate Commerce Committee despite the strong opposition of the trial lawyers. The bill provides a vehicle to seriously address reforms of product liability laws. Not only do we believe that the legislation is a good first step for product liability reform, but we also believe that it sets the stage for addressing tort reform in general.

One of the most commendable aspects of the bill is the fact that it does not preempt states from enacting further product liability reforms. As federal legislation should, S. 2760 sets a minimum standard but allows states to exceed that standard if they do not conflict with the provisions of the federal law. This aspect is vitally important because the reforms in S.2760 may be the only relief seen in many states since trial lawyers tend to dominate state legislatures.

While ATRA strongly believes that product liability legislation should move forward quickly, we nevertheless are compelled to suggest some important additions and changes to S. 2760. It is not our intention to sidetrack the legislation but we feel that certain changes are critical.

The most glaring deficiency in Senate Bill S.2760 is the failure to set forth a uniform standard of product manufacturers' liability. Section 302 of Title Three, "Civil Actions," clearly and appropriately creates a uniform standard for product sellers' liability. This is to be commended, but unfortunately nowhere in Title Three is a similar standard set forth concerning the manufacturers' liability. Without the uniform standards being set for the manufacturers, each state and each judge within the various court systems will be able to interpret or create a liability standard for the manufacturers.

It is imperative that a uniform standard be set for manufacturers' liability, and that the standard must be based upon the fault concept. A claimant must be required to prove: a) that a manufacturer failed to exercise reasonable care with respect to the design or the manufacture of the product and that such failure to exercise reasonable care was a proximate cause of the claimant's injury, or b) that the manufacturer failed to exercise reasonable care in failing to warn the claimant of a condition that was known or should have been known to the manufacturer and that such failure was a proximate cause of the claimant's injury.

Furthermore, a manufacturer should not be liable when his product at the time of production was in compliance with then existing state-of-the-art manufacture or design or complied with existing federal or state standards. A manufacturer should also not be liable for any harm or injury caused by a product that has been misused or contains an open and obvious defect or one which has been altered.

It is further noted that the bill does not contain an abolishment of the joint and several liability theory on behalf of the product manufacturer. This elimination of the joint and several liability is an absolute necessity in order to obtain a uniform standard throughout this country and its varied court systems.

Mr. Chairman, I think the nation deserves a product liability system that is predictable and uniform, and I believe that that will be achieved if S.2760 is amended consistent with our suggestions above. It should provide a system that allows prompt, just and full compensation to injured victims at a reasonable cost. In other words, it will be a system that does not outrage our common sense notions of justice.

ATRA is strongly committed to long term efforts to reform the U.S. tort liability system. Again we applaud the efforts of the Senate Commerce Committee in reporting out what many consider to be the first step toward a comprehensive overhaul of our tort system. We urge the members of this distinguished Committee to support and improve it. Thank you for the opportunity to present our views today. I will be happy to answer any questions.

Senator McConnell. I assume then you would prefer to see, as you indicated, a comprehensive tort reform bill at the Federal level rather than a product only tort reform bill?

Mr. Coyne. The members of the American Tort Reform Association, while they support this specific bill because it does provide relief, also strongly believe that the broader the bill is, the better it will be for all Americans.

Senator McConnell. That is, of course, my bill as you know, and I certainly share the view that it does not make any sense to segment out just the products portion for relief and ignore the balance of society which is suffering under the current system.

Mr. Coyne. Well, as you know, Mr. Chairman, the American Tort Reform Association has endorsed your bill as well, and we hope that in the debate that follows on the Senate floor will provide many improvements to this specific piece of legislation along the lines of your earlier legislation.

Senator McConnell. Thank you, Mr. Coyne.

Mr. Curcio.

STATEMENT OF JOHN B. CURCIO

Mr. Curcio. Thank you, Mr. Chairman.

I am chairman of the board and chief executive officer of Mack Trucks, Inc., but today I am testifying on behalf of the National Association of Manufacturers as a member of its board of directors.

I also ask that my complete written testimony be submitted for the record.

Senator McConnell. That will be included.

Mr. Curcio. Also with me today is Sharon Spiegelmeyer of the National Association of Manufacturers.

NAM's message to the Senate Judiciary Committee is simple. The time is long past for the U.S. Congress to pass a Federal product liability law. Manufacturers of every size, producing the highest quality of products, are under siege by the convoluted patchwork of 50 State systems now in effect.

The bill passed by the Senate Commerce Committee is certainly a far cry from what the manufacturers of this Nation believe is necessary to significantly bring down insurance rates. We believe it must be strengthened on the floor if it is going to curb some of the worst abuses in our system.

However, it is a positive step in the right direction. It will help us get on the road toward stability, uniformity, and predictability. It will not, as its most ardent critics say, inhibit in any way the rights of injured victims to recover a just award when their injury was the result of a faulty product.

The committee should be commended for attacking some of the abuses we have seen in the punitive damage area.

Another positive reform includes a very reasonably 25-year statute of repose limiting manufacturers of capital goods from liability claims for decades after their product was produced.

Other measures which NAM endorses include the uniform standards for offsetting damages by workers' compensation benefits, the uniform statute of limitation, the defense for manufacturers when a plaintiff causes his own injury by being drunk or on drugs, and the presumption that people injured in foreign countries should sue in that country.

We wholeheartedly endorse the provision which holds attorneys liable for bringing frivolous lawsuits or intentionally causing delay.

As to the provision on the unfair theory of joint and several liability, the committee adopted the approach overwhelmingly endorsed by the California voters in the now famous proposition 51 referendum. This is a half-way approach to a totally unjust theory. It provides that the defendants will still be jointly and severally liable for economic damages. For noneconomic damages, the defendant would only pay his proportionate share. If a manufacturer is only 5 percent guilty, he should only have to pay 5 percent of the damages, whether or not they are economic damages or noneconomic damages. Otherwise the insurance companies simply cannot weed out the safe companies from the nonsafe companies. Unpredictability is the hallmark of this theory and should be abolished unless defendants act in concert.

During the entire Commerce Committee debate, no single issue was more contentious than the expedited settlement procedure. The business community never once during the process advocated or sought a settlement procedure. It was the result of months of compromise sessions between consumers, labor representatives, spokesmen for the plaintiffs' bar and business leaders.

We would like to see some improvements in the proposed system. At any rate, we believe that, above all, a balance must be maintained between the incentives and the penalties, or the whole settlement structure will be rendered completely ineffective. We believe if such a balance cannot be maintained, then we should revisit the settlement proposal originally passed by the Commerce Committee by a 16 to 1 vote. It would basically require the losing party to pay the other party's attorney's fees if settlement had been rejected. Again, while imperfect, it would be a balanced approach.

One of NAM's top priorities for product liability reform has always been to establish a Federal fault standard.

We still maintain a fault standard should be adopted. Some particular basic fairness questions in this area should be addressed. A company should not be held liable if someone misuses or alters their product. And manufacturers should not be held liable if they have produced a product that complies with the best available and feasible, scientific, and medical knowledge at the time the product was made. But, in today's world, companies can be held guilty 30 years after a product was made because the knowledge we have today is much more advanced. The absence of a state-of-the-art defense will continue to impede development of new and innovative products, many which would improve our quality of life.

Thank you, Mr. Chairman.

[Statement follows:]

TESTIMONY OF JOHN B. CURCIO
ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning, Mr. Chairman and members of the Committee. My name is John B. Curcio. I am the Chairman of the Board and chief executive officer of Mack Trucks, Inc., testifying today on behalf of the National Association of Manufacturers as a member of its board of directors.

The National Association of Manufacturers is a voluntary business association of over 13,500 companies, large and small, located in every state. Our members range in size from the very large to over 9,000 small manufacturing firms that each have less than 500 employees. NAM member companies employ 85% of all workers in manufacturing and produce over 80% of the nation's manufacturered goods. NAM is affiliated with an additional 158,000 businesses through its Association Council and the National Industrial Council.

I. Introduction:

NAM's message to the Senate Judiciary Committee is simple: the time is long past due for the United States Congress to pass a federal product liability law. Manufacturers of every size, producing the highest quality of products, are under seige by the convuluted patchwork of 50 state systems now in effect. Individual state reform does nothing to bring predictability, uniformity and rationality to our nation's businesses. And for the millions of consumers, I think they are sick and tired too of footing the bill for a court system run amuck.

Larger companies can discontinue certain products, can sometimes pass the pricetag onto their consumers, and can sometimes lower costs by having more of their parts produced overseas. While this system hurts such companies and their employees, they can survive. NAM's smaller members cannot. As you know the 1,800 delegates to the White House Small Business Conference just three weeks ago ranked federal product liability and tort reform their number one issue; over and above taxes and trade. Small manufacturers are going out of business, they're going bare, they feel their very ability to survive is on the line. For many of those small businessmen, it is not only their business assets at stake, it's their personal assets as well. The White House Small Business representatives' plea was for Congress to tackle this problem. It is the plea of all of the companies represented by NAM, as well.

An Analysis of S. 2760, The Product Liability Reform Act

The bill passed by the Senate Commerce Committee is certainly a far cry from what the manufacturers of this nation believe is necessary to significantly bring down insurance rates. We believe it must be strengthened on the floor if it is going to curb some of the worst abuses in our system.

However, it is a positive step in the right direction. It will help get us on the road toward stability, uniformity and predictability. It will not, as its most ardent critics say, inhibit in any way the rights of injured victims to recover a just award when their injury was the result of a faulty product.

The Committee should be commended for attacking some of the abuses we've seen in the punitive damage area. Punitive damages should not be awarded unless there is "clear and convincing evidence" of "conscious, flagrant" indifference to the safety of others. And companies who comply with the Food and Drug Administration, Federal Aviation Administration and similar standards should have a defense against having punitive damages awarded against them.

Another positive reform includes a very reasonable 25-year statute of repose limiting manufacturers of capital goods from liability claims for decades after their product was produced. While many of us believe a shorter statute should be enacted, this will at least place a cutoff date after which a company can close the books on a product.

Other measures which NAM endorses includes the uniform standards for offseting damages by workers' compensation benefits, the uniform statute of limitation, the defense for manufacturers when a plaintiff causes his own injury by being drunk or on drugs, and the presumption that people injured in foreign countries should sue in that country.

We wholeheartedly endorse the provision which holds attorneys liable for bringing frivilous lawsuits or intentionally causing delay.

As to the provision on the unfair theory of joint and several liability, the committee adopted the approach overwhelmingly endorsed by the California voters in the now-famous Proposition 51 referendum. This is a half-way approach to a totally unjust theory. It provides that the defendants will still be jointly and severally liable for economic damages. For non-economic damages, the defendant would only pay his proportionate share. If a manufacturer is only five percent guilty, he should only have to pay five percent of the damages -- whether or not they're economic damages or noneconomic damages. Otherwise, the insurance companies simply cannot weed out the "safe" companies from the "nonsafe" companies. Unpredictability is the hallmark of this theory and should be abolished unless defendants act in concert.

The Settlement Procedure

During the entire Commerce Committee debate, no single issue was more contentious than the expedited settlement procedure. The business community never once during the process advocated or sought a settlement procedure. It was the result of months of "compromise" sessions between consumers, labor representatives , spokesmen for the plantiffs' bar and business leaders.

Several settlement procedures were formally commented on during the long markup process. Not one of the procedures was wholeheartedly endorsed by either the consumers or the business community. Today, little has changed. NAM has always endorsed the goals of a settlement procedure: to diminish transaction costs and to provide quick, prompt, fair settlement for victims who are injured as a result of a faulty product. But any such settlement forcing mechanism is bound to be flawed.

While many have condemned the $250,000 cap on pain and suffering within the settlement procedure, there are many provisions which shift the balance toward the consumer. In addition, state after state in this nation is passing caps ... and there are no strings of settlement tied to those caps. Washington, Colorado, Florida, Hawaii, Maryland --just to mention a few-- have all passed various caps on these types of damages.

The settlement procedure should be viewed in broader terms. It should be a system of incentives and penalties to encourage very quick settlement of cases. As part of the balance, there is a form of penalty of $100,000 for defendants if they don't win in court after refusing to settle -- a hefty penalty on top of whatever the jury awards. The procedure provides a defendant only 60 to 90 days after a demand for settlement is made to decide whether liability exists. This is particularly troublesome in toxic and drug cases where liability often takes years to be determined.

We would like to see some improvements in the proposed system. At any rate, we believe that above all a balance must be maintained between the incentives and the penalties or the whole settlement structure will be rendered completely ineffective. We believe if such a balance cvannot be maintained, we should revisit the settlementl proposal originally passed by the Commerce Committee by a 16-1 vote. It would basically require the losing party to pay the othewr party's attorneys fees if settlement had been rejected. Again, while imperfect, it would be a balanced approach.

III. Strengthening The Bill

One of NAM's top priorities for product liability reform has always been to establish a federal fault (negligence) standard. Manufacturers believe they should step forward and compensate victims when they are at fault. But the trend toward strict liability and in some states near absolute liability has made it impossible for companies to depend on good safe products keeping them out of court.

We still maintain a fault standard should be adopted. Some particular basic fairness questions in this area should be addressed. A company should not be held liable if someone misuses or alters their product. And manufacturers should not be held liable if they have produced a product that complies with the best available, and feasible, scientific and medical knowledge at the time the product was made. But in today's world, companies can be held guilty 30 years after a product was made because the knowledge we have today is much more advanced. The absence of a state-of-the-art defense will continue to impede development of new and innovative products -- many which would improve our quality of life.

IV. Conclusion

S. 2760 is a modest package, one which should be strengthed by providing some fault-based defenses and by eliminating joint and several liability. In addition, NAM believes the settlement process could be improved. But in no case do we believe that controvery over the settlement procedure should impede this Senate from passing meaningful product liability tort reform this year.

Senator McCONNELL. Mr. Curcio, in your statement, you criticized the convoluted patchwork of 50 State systems now in effect, and you go on to say "individual State reform does nothing to bring predictability."

I believe that your reference here obviously is to product liability reform. I think the analysis, however, applies also to the need for comprehensive tort reform beyond product liability. I wonder what your observation is about that?

Mr. CURCIO. I agree. At any rate, we at NAM believe that real tort reform is the most important thing that must be addressed by Congress, even more important than the thing that some people seem to be throwing in as a roadblock, and that is the settlement procedure. Because most cases in fact are settled before they even go to court.

Senator McCONNELL. There have been some observations lately that the liability insurance crisis is coming to an end, and I wonder if you agree with that assessment?

Mr. CURCIO. It certainly is not coming to an end in the circles that I travel in, and they involve many, many other businesses and industries beside my own.

I can relate to you very quickly just several things. For example, small business people, like truck operators, those that own as little as one or two trucks find today that not only are their insurance rates escalating to a level higher than their profits but, in many cases, they cannot secure insurance.

The same is true of all small businessmen, like truck dealers in every State that you gentlemen represent. These people today find that they cannot get product liability or garageman's liability insurance any more. And if they can, their rates are exorbitant.

I can certainly see in my position no end in sight today to this insurance crisis.

Senator McCONNELL. Let us assume that it did end. Would there still be a need for tort reform?

Mr. CURCIO. I think there will be because I do not think that there is the one thing that we really need to bring it to an end, and that is predictability. Nor do I think that today we have a clear focus on liability based on fault.

Senator McCONNELL. Mr. Motley.

STATEMENT OF JOHN J. MOTLEY III

Mr. MOTLEY. Thank you, Mr. Chairman.

I am John Motley, the Director of Federal Legislation for NFIB.

I would like to commend the committee for holding this hearing and thank you for the opportunity to testify on behalf of NFIB and its more than 500,000 members coast to coast.

I would like to submit my statement and summarize it for the committee if I can.

NFIB supports S. 2760 with reservations and urges the committee to report it as quickly as possible.

The crisis in availability and affordability of liability insurance has been the one item that NFIB has heard the most about from its membership over the last 18 months. Just earlier this summer, NFIB's Institute for Enterprise Advancement published a study entitled "Small Business Problems and Priorities."

We gave the membership 75 different areas to choose from, which are normally considered to be small business problems. Of those 75 areas, the top 2 that came out were insurance related; the No. 1 was the cost of health insurance, and No. 2 was the cost and availability of liability insurance; 38 percent of the respondents rated the cost and availability of liability insurance the most critical problem facing their business.

The recently concluded White House Conference on Small Business agreed with this, because the No. 1 recommendation to come out of that conference, out of the 60 that were put forward, was a very comprehensive recommendation on dealing with the liability insurance crisis. It received 1,419 of the 1,715 votes cast.

NFIB believes that the causes of this crisis are twofold. First of all, we, like the other witnesses up here now, believe that the civil justice system of this country is somewhat out of control and needs to be addressed. But we also believe that the business practices and the regulation or the lack of regulation of the insurance industry also needs to be reviewed by Congress.

NFIB believes that both of these problems need to be addressed. As both of you know, NFIB sets its position on legislative issues by polling its membership. Recently, we have polled a number of related questions to the problem.

In February 1986, we polled comprehensive civil justice reform of the membership; 84 percent of those responding said that they supported comprehensive civil justice reform, while only 5 percent opposed.

One month later, we polled caps on awards, and 76 percent of those responding supported capping awards, while only 18 percent opposed.

It is answers like this which we would support and which are included in the legislation which has been introduced by Senator McConnell.

In addition, we have also polled very recently, in August of this year, whether to end or to repeal the antitrust exemption for the insurance industry, the so-called McCarran-Ferguson Act. And 60 percent of our membership would support ending that exemption, while 26 percent would oppose.

I might also mention here that the recommendation that finished No. 1 at the White House Conference on Small Business included both of these as part of the remedy that they would suggest. I have attached to my testimony a copy of that recommendation, a complete copy.

From the White House Conference, the No. 1 recommendation included those two elements. It also felt that the issue of products liability was important enough to address not only in that recommendation, but also as a separate recommendation, recommendation No. 9. And that recommendation supported the enactment of S. 2760, and it received 1,146 of the 1,715 votes which were cast.

I would submit to you that for the delegates to use two of their votes to put these two issues within the top 10 recommendations of the Conference kind of indicates the seriousness that they believe the situation has reached.

NFIB members have traditionally voted against a national product liability law. In fact, up until very recently, they would have agreed with Senator Heflin, that it was an issue that was to be dealt with at the State level.

Back in December 1981, only 37 percent of our membership were in favor of dealing with it at the Federal level. In July 1982, that had risen to 45 percent. But, in December 1985, there was a massive shift in membership opinion, with 65 percent of those members responding saying that they now favor the national product liability tort law. Only 27 percent opposed it.

I would again submit to the committee that this reflects the severity of the problem that is now the scourge of the small business community of this country.

S. 2760, as reported by the Commerce Committee, is supported by NFIB, and we believe the vehicle, or at least a partial vehicle for some of these changes. Not only do we support it, but the White House Conference on Small Business again supports it with some reservations.

Like the White House Conference on Small Business, NFIB believes that the bill needs to be strengthened by addressing the issue of a uniform standard of fault based liability. We also believe that it needs to be strengthened by addressing the elimination of joint and several liability in products cases.

But there is a third area in addition that NFIB also has problems with, and that is the section of the bill which eliminates the right of the employer to recover workers' compensation costs from the manufacturer. This right of subrogation is allowed in over 40 States, and this bill would do away with that right. In effect, we believe that what this section would do would be to reduce costs for manufacturers and for the insurance industry while increasing the costs for all other employers. In particular, we believe it would increase workers' compensation costs across the country from 2 to 4 percent. And we would like to see it deleted from the bill.

Mr. Chairman, that is the end of my testimony, and I will be happy to answer any questions that you or the committee might have.

[Statement follows:]

STATEMENT OF

JOHN J. MOTLEY III
DIRECTOR OF FEDERAL LEGISLATIVE AFFAIRS

OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Senate Judiciary Committee
Subject: Liability Insurance
Date: September 10, 1986

I am pleased to appear before you today on behalf of the National Federation of Independent Business (NFIB), an organization comprised of over 500,000 small and independent business owners.

The unavailability and unaffordability of liability insurance has been the most problematic situation faced by many small business owners during the past year. A survey of our membership conducted by the NFIB Institute for Enterprise Advancement in January asked our members to rank seventy-five business problems in order of importance. Out of all seventy-five choices, the top two problems were insurance-related, the first being the cost of health insurance, and the second being the cost and availability of liability insurance. Federal taxes placed fourth, and workers compensation costs placed seventh.

Another recent NFIB poll spurred NFIB to join the fight for federal product liability reform. According to Mandate polls taken in 1981 and 1982, NFIB members expressed opposition to uniform product liability standards by votes of 37% to 48% and 45% to 48%, respectively. However, this year they reversed position, voting 65% in favor, 27% opposed, and 8% undecided.

At a conference held recently here in Washington, 1,800 small business owners echoed these sentiments. This conference, the national meeting of the White House Conference on Small Business (WHCSB), was the culmination of a year-long endeavor involving state and regional conferences. The purpose of the WHCSB was to compile a list of recommendations for action pertaining to small business issues. Over 400 recommendations were distilled from the local conferences, and these were pared down to 60 final recommendations by the small business owners who were elected or appointed delegates to the national conference.

It came as no surprise to those of us who work in the small business community that liability insurance was at the top of the final list. The recommendation calls for specified elements of tort and regulatory reform to address the general "liability insurance crisis" (copy attached). The Number Nine recommendation calls for the enactment of S. 2760 with the Kasten/Lugar/Kassebaum and Pressler amendments.

The fact that two of the top ten recommendations coming out of the WHCSB focus on liability insurance underscores the severity of the problem. The fact that the broader of the two recommendations placed ahead of the other reaffirms the viewpoint that NFIB has espoused throughout the debate: Congress should address general liability, not just product liability, and should revisit the McCarran-Ferguson Act, specifically its effect on the regulation of the insurance industry. Consequently we support efforts, such as those of Senators McConnell and Simon, toward broad reform of tort law and review of the McCarran-Ferguson Act, respectively.

However, product liability reform is the only train leaving the station, and S. 2760 appears to be the only viable option for Congressional action this year. S. 2760 is better than S. 1999, but not as good as the Administration's bill; none are the comprehensive solution advocated by NFIB. In light of the realities of the situation, though, we support passage of S. 2760 if the Kasten/Lugar/Kassebaum and Pressler amendments -- which would establish fault-based standards of defense and eliminate joint and several liability, respectively -- are adopted and one provision is deleted.

The provision NFIB opposes would eliminate the right of subrogation except in the state of Washington. Subrogation in this context is the recovery of workers compensation awards by the employer/workers compensation carrier from a manufacturer (third party) who is held liable for an employee's injury. An employer's right of subrogation is recognized in over 40 states. Statutory language pertaining to subrogation is contained in states' workers compensation statutes not product liability statutes. Insurers have unsuccessfully attempted to eliminate subrogation via the state legislatures. Now they see federal product liability reform as a potential vehicle. The impact of this effort on small business would probably be a 2 - 4% increase in workers compensation costs -- the costs that NFIB members cited as their seventh biggest problem in running a small business.

In conclusion, we urge floor consideration of S. 2760 this year. Speaking before the attendees at the White House Conference on Small Business, Senate Majority Leader Dole indicated that chances for action were good, and he received a standing ovation at that point in his speech. That audience of small business owners understands the importance of getting product liability reform through the Senate in this Congress. They understand the meaning of the Kasten/Lugar/Kassebaum and Pressler amendments. On behalf of these small business owners, we urge you to support Senate action this year on S. 2760 with the previously-mentioned amendments and to convey these views to Senator Dole.

Thank you again for the opportunity to testify.

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FINAL RECOMMENDATIONS

THE WHITE HOUSE CONFERENCE ON SMALL BUSINESS

August 17-21, 1986

1. Because the liability insurance crisis in the United States has not only become a life and death sentence to many small businesses, but also is changing adversely our way of life, we must pursue a four pronged effort at reform: civil justice reform; uniform standards for product, professional and commercial liability; regulation of the insurance and re-insurance industries; and viable affordable alternatives to liability coverage.

We, therefore, strongly urge the President, the Congress, and the state legislatures, to implement the following action as a vitally important step in alleviating the problems of availability and affordability of liability insurance to small business in America:

A. Civil Justice Reform:

1. Return to a fault based standard of liability.

2. Base causation findings on credible scientific and medical evidence and opinions.

3. Eliminate joint and several liability in cases where defendants have not acted in concert.

4. Limit non-economic damages (such as pain and suffering, mental anguish or punitive damages) to a fair and reasonable maximum dollar amount, not to exceed $250,000 in any case.

5. Restrict punitive damage awards to cases of willful and malicious conduct. The amount awarded shall go to a governmental trust fund, not the plaintiff.

6. Limit attorneys' contingency fees to reasonable amounts on a sliding scale.

7. Reduce awards in cases where a plaintiff can be compensated by certain collateral sources to prevent windfall double recovery.

8. The prevailing party in a legal action should have a statutory right to recover its costs and attorneys' fees from the non-prevailing party.

9. Impose a uniform, reasonable statute of limitations and repose in all tort actions; and hold defendants to the state-of-the-art in existence at the time the product was manufactured or the service was performed.

10. Provide for periodic instead of lump sum payments for future medical care or lost income.

11. Encourage use of alternative dispute resolution mechanisms to resolve cases out of court.

B. Federal Standards for Product, Professional and Commercial Liability:

Establish a uniform standard of fault based product, commercial, and professional liability which incorporates provisions cited in "Civil Justice Reform" above.

C. Availability and Affordability of Liability Insurance and Re-Insurance:

1. Review McCarran-Ferguson Act of 1945 as it applies to state regulation of insurance and the industry's limited exemption from anti-trust laws.

2. Promote the establishment of joint underwriting associations

and assigned risk pools.

3. A minimum of 60 days notice should be required for an insurer to non-renew a policy or to increase its unit premium by more than 25 percent. Mid-term cancellations should be prohibited and premiums should be based on experience ratings.

4. Promote tax deductible self-insurance through risk pooling and other group arrangements, including the expansion of The Risk Retention Act of 1981.

5. Legislate a self-insurance system that would allow small businesses to pay premiums into a fund with pre-tax dollars which could be used for no other purpose than the payment of claims, with the fund being regulated in the same manner as any other insurance company.

6. Require the insurance industry to make complete financial disclosures by lines of insurance, so that Congress, state legislatures, and state insurance commissioners may call on it at any time.

D. Education:

Realizing that the most effective long-term solution to the liability insurance problem is a knowledgeable citizenry, we urge an ongoing education program to develop an awareness that:

1. The litigious nature of the American public will profoundly affect our way of life as the cost of public and private facilities becomes unaffordable.

2. There is no such thing as a riskless society, so each of us must assume some responsibility for his/her own safety and the normal hazards of everyday living. [R.A. 180, Liability Insurance; 1419 votes of 1715 ballots cast]

Senator McConnell. Two quick questions.

If I were to offer my bill S. 2046 as a substitute for S. 2760, assuming the majority leader were to bring that up, would your organization be for or against that?

Mr. Motley. We support your bill, Senator. I think the floor situation at the time might have some consideration on how strongly we would support it. But we certainly do believe that the problem is a much broader one than the one addressed by S. 2760, and believe, like ATRA, that it should be addressed at the Federal level.

Senator McConnell. Because, in fact, S. 2760 is probably not going to do anything for the majority of your members, right?

Mr. Motley. That is very true.

Senator McConnell. Do you believe that repeal of the McCarran-Ferguson exemption would increase liability insurance availability?

Mr. Motley. I do not know if I could answer that question, Senator. We certainly believe that this particular industry should be treated like all other industries in the United States.

Senator McConnell. So it is a fairness issue with your membership?

Mr. Motley. It is very much a fairness issue.

We also do believe that it gives them somewhat of an upper hand in dealing with the individual States. One of the complaints that we have received from our membership is indeed the type of situation which happened in West Virginia where individual States have taken strong stands—or in Florida, then the insurance industry has reacted almost in a case of saying, you know, we are going to take our ball and go home, and we are not going to write insurance in your State any longer. You cannot deal with this situation piecemeal 50 States at one time.

Senator McConnell. Senator Broyhill.

Senator Broyhill. Thank you very much.

I am interested, in learning how many people your organizations represent, how many individual businesses. I know that your organization, Mr. Coyne, is composed of a number of different groups, performing excellent work in this area.

Would you have an estimate as to how many individual businesses would be represented in your organization? It would be thousands, would it not?

Mr. Coyne. Well, in fact, it would be millions, Senator.

The American Tort Reform Association and its affiliate organizations represent 30 million American employers and employees across this country. Our members, for example, include the American Red Cross, the American Business Conference, the Business Roundtable, the NFIB, the American Recreation Coalition, the Boy Scouts of America, the National School Board Association, the American Medical Association, the American Consulting Engineers Council, and the National Institute of Architects. What we really see here is a problem that is not a specific problem affecting just one small sector of America, it is affecting every single American.

Senator Broyhill. This is a broad-based problem and a broad-based group of people are coming forward to ask for some relief.

Mr. Coyne. That is exactly right, Senator.

Senator BROYHILL. I know, your organization has a large membership. I believe you are a member of this group of several hundred thousand. Are these individual businesses coming forward and saying they want to see some reform?

Mr. MOTLEY. Yes, Senator; I looked at the figures yesterday. NFIB has 517,009 member firms roughly employing 10 individuals each.

Senator BROYHILL. And, of course, NAM is a large organization composed of the larger firms. Am I correct in assuming that you have the overwhelming support of all of your members for this position?

Mr. CURCIO. Yes. And as you know, that covers quite an extensive field of manufacturing firms of all sizes, in fact about 13,500 different firms in every State of the country.

Senator BROYHILL. I want to briefly say, Mr. Chairman, I welcome this group before the committee. I have been fighting for enactment of uniform product liability legislation for many years. And it is my hope that we can move forward with this legislation. I do not know if we can do it in this session, but we will certainly try.

I want to commend Chairman Kasten and the other members of the other committee who have led the fight for this legislation. It can be improved. But it is needed legislation. We need to get behind it, subject it to the legislative process, and let the Senate work its will, and the House work its will. I think if we can accomplish that, we will come out with something that is in the public interest.

I became interested in this subject matter a number of years ago, when I served as a member of the House Energy and Commerce Committee in the House of Representatives. Beginning in the 96th Congress hearings were held with respect to this problem and I introduced legislation in conjunction with then Congressman Preyer of North Carolina. Richardson Preyer, my colleague from North Carolina, and I introduced a bill in the 96th Congress that was, I believe, the first comprehensive product liability reform legislation introduced in the Congress. Unfortunately, we did not get action at that time, and we have seen the problem grow worse. We have seen the varying rulings and court decisions handed down by the individual States, greatly increase the cost of doing business. I am also concerned by another issue. That is, import penetration into our markets, and the effect the increased costs have on our ability to compete against foreign competitors who do not always bear those same costs.

It seems to me that everyone loses under the present system—consumers, plaintiffs, defendants, employees, and employers. I think it is time that we do something.

Generally, I agree with the Senator from Alabama, when he says that problems like this can best be left to the States. Unfortunately, despite their best efforts, the States have been unable to resolve all of the problems of product liability tort reform.

Products are manufactured in one State, but they are sold, distributed, and used in another State. Data does show products manufactured in a given State, are generally consumed outside of that State. Therefore, it seems to me that what we need to do is take a look at this from a national perspective. The decision in a State other than my home State of North Carolina drives up the cost of doing business in North Carolina. We should be concerned about making sure that the laws are encouraging manufacturers to improve product safety, and encouraging them to take steps to improve their products. That is one of the aspects of this legislation, as you well know.

I realize that the plaintiff bar is still opposed to this legislation just as they were back in the 96th Congress. I wish they would step forward and help us to write some legislation here.

Liability legal costs often exceed the amounts that are recovered by the injured and plaintiffs. And it should be obvious to everyone that it is time for reform of the tort litigation system. I know there will be several amendments adopted. I, of course, will be studying these with a great deal of interest. I just hope we do not see a delay like we were discussing a few moments ago. I do not think manufacturers or distributors of products have the time for another 10 years of hearings.

I think that this bill is a good basis for a fair and balanced solution to this urgent national problem, and I would urge its prompt enactment.

I thank you very much.

Senator McConnell. Thank you, Senator Broyhill.

Mr. Motley. Mr. Chairman, I have—just listening to Senator Broyhill's comments—a terrible sense of deja vu because I was involved very much in those original set of hearings and the original effort to try to do something on products liability. And it appears to me that where you are in what you are trying to propose and push right now in the area of general liability insurance is exactly where we were 10 years ago on products liability. And I hope we do not have to wait 10 years and find out we have not moved very far on this issue also.

Senator McConnell. Just in my year and a half here, it has occurred to me that this seems to be everybody's favorite hearing topic, every committee of Congress darn near except the Foreign Relations Committees, and they may be next, has had a hearing on the subject. But it does not seem to be anybody's favorite topic for doing something. And I think Senator Broyhill has put his finger right on it.

Thank you very much, all of you.

We are moving toward the close here. Both parties have their weekly policy luncheons at 12:30. We do not want to have anybody wait any longer who has been here patiently all morning. I do want the second panel to come forward, Edward Zuccaro, National Conference of State legislatures; Philip Hermann, chairman of the Board of Jury Verdict Reporting, Inc.; and Robert Roper of the National Center for State Courts.

Gentlemen, if you see Senator Broyhill and myself depart, it is not because we are not interested in what you have to say. I am going to ask Larry Herman, who is chief counsel of the Subcommittee on Courts, which I chair, to finish the hearing. And so we are going to hear from you and we are going to have some questions for you, and do appreciate your waiting. But Larry may be finishing it up.

We will lead off with Mr. Zuccaro.

STATEMENTS OF PANEL CONSISTING OF: HON. EDWARD R. ZUCCARO, A REPRESENTATIVE IN THE VERMONT HOUSE OF REPRESENTATIVES, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES; PHILLIP J. HERMANN, CHAIRMAN OF THE BOARD, JURY VERDICT RESEARCH, INC.; AND ROBERT ROPER, NATIONAL CENTER FOR STATE COURTS

Mr. ZUCCARO. Mr. Chairman, Senator Broyhill, my name is Edward Zuccaro, and I am a member of the Vermont House of Representatives where I sit as the ranking Republican member on the Committee on Ways and Means. But I also serve as Vice Chair of the Law and Justice Committee of the National Conference of State Legislatures.

NCSL, through its State and Federal Assembly, of which the 50 State legislatures are represented, adopts policy resolutions on important issues involving State and Federal relations. I appear before you today to express NCSL's concern about what Federal preemption of a large area of State civil law would mean for the vitality of our federal system and the effect it would have on the functioning of our State court systems. It is for these reasons that NCSL has taken a position in opposition to Federal preemption of product liability law.

We certainly recognize that a problem exists in the area of availability and affordability of liability insurance. And in particular a very real problem exists in the field of product liability. But the States, in recognition of the existence of these problems, have acted. Virtually every State has passed some form of tort reform. A number have specifically dealt with product liability reform. For example, Kansas has made the introduction of evidence of post-accident improvements inadmissible. Iowa, this last year, adopted an absolute state-of-the-art defense in product liability cases.

The States have also dealt with the issue of insurance regulation and have adopted legislation to streamline and reform the regulation of the insurance industry in various States. This is not, however, only an issue that deals with tort reform and insurance. It is also an issue that deals in general with economic cyclical factors, interest rates and foreign currency exchange rates even, especially in the area of reinsurance with foreign companies, such as Lloyd's.

NCSL's position is that each level of government has a role to play in dealing with the product liability question. I heard you let the States deal with tort reform and product liability issues. They have already acted and they have the capacity to act and enact further legislation based upon the accumulative experience with what has taken place at this point.

NCSL in studying this issue has heard testimony that preemption of products liability law would create problems for the States and would not necessarily achieve the stated goal of uniformity, and that it might not ultimately resolve in the reduction of insurance costs. For example, section 308 of S. 2760 propose to eliminate joint liability in products cases. Changing this rule in product liability cases would create confusion in multiparty litigation, which might involve both product liability claims and other tort claims.

I think Mr. Willard in his testimony this morning alluded to this potential difficulty.

Section 310(b) of the bill would bar certain evidence in product cases. However, that evidence might be admissible against other defendants where there are multiple defendants and joint tortfeasors in particular cases.

S. 2760 and similar legislation would not necessarily bring about uniformity. Product cases would still be brought in the various State courts. The 50 State supreme courts would then be left to interpret the language of S. 2760. And I might say S. 2760 brings to the front various new concepts and includes new language which the courts are going to be left to construe the 50 courts. Such definitions and such language as reasonable care, the meaning of the term "conscious, flagrant indifference," "useful safe life," "good faith."

With each of the States dealing with these issues, I do not see that the provisions of S. 2760 in fact will result in uniformity in the area of products liability.

S. 2760 would not only be difficult to administer but would be an unwarranted preemption of State law. And this really is the basis of the opposition of the National Conference of State Legislatures to this proposal. The Federal Government, acting through Congress, acting through the Federal Courts, and acting through a maze of Federal administrative agencies, has over the years, under the supremacy clause entered into an ever greater number of policy areas which have traditionally been the area of State concern.

The Supreme Court, in *Garcia* v. *San Antonio* has stated that it is the primary responsibility of Congress to protect the States from Federal intervention. I urge you to adopt a policy of restraint and to decline to preempt the States in the area of products liability.

Thank you.

[Statement follows:]

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President David E. Nething
Majority Leader
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TESTIMONY OF

REPRESENTATIVE EDWARD R. ZUCCARO

VERMONT HOUSE OF REPRESENTATIVES

ON BEHALF OF THE

NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. Chairman and members of the committee:

I am Edward Zuccaro. I am a member of the Vermont House of Representatives where I serve as a spokesman for the Republicans on the Ways and Means Committee. I also serve as vice-chairman of the Law and Justice Committee of the National Conference of State Legislatures.

I appear today on behalf of the National Conference of State Legislatures. NCSL represents over 7,400 state legislators in the 50 states, the Commonwealth of Puerto Rico, and the American territories. NCSL through its State-Federal Assembly, in which all the states are represented, adopts policy resolutions on important issues of state-federal relations. One of those important issues is federal preemption of state product liability law. NCSL has for several years consistently opposed federal preemption of product liability law.

NCSL's policy is based on concern about what preemption of a large area of the civil law would mean for the vitality of our federal system and for the smooth functioning of our state court systems.

NCSL recognizes that manufacturers and product sellers across the country face severe problems finding affordable liability insurance. Many firms have been faced with mid-term cancellations or the non-renewal of their liability insurance coverage. The cost has risen so high as to make certain lines of insurance in effect unavailable. Although insurance is a cyclical industry and though we have faced liability insurance crises in the past, never before have we faced a liability insurance crisis of this severity. Let me assure you that state legislators understand how serious this problem is and are addressing the problem.

In the 44 legislatures in session during 1986, over 1400 bills were introduced in response to the high cost and unavailability of liability insurance. Between January 1 and June 30, 1986, 41 states passed some form of tort reform legislation. Many of the across-the-board civil justice reforms applied to product liability, and some states specifically addressed product liability. Kansas, for instance, enacted legislation making evidence of post-accident improvements inadmissable in product liability actions. Iowa adopted an absolute state-of-the-art defense for manufacturers. Nor was legislative action limited to tort reform. Twenty-four states passed some form of new insurance regulation. (See attached chart of 1986 state legislative action on tort reform and insurance.)

State legislative action in the first half of 1986 built on a base of already extensive state tort reform and insurance reform legislation enacted in 1985 and previous years. For example,in the first half of 1986, thirteen states modified the doctrine of joint and several liability. This was in addition to the laws modifying joint and several liability already on the books in twenty-two states as of January 1, 1986. Similarly, the 16 states which acted in 1986 to limit non-economic damages built on a base of 13 existing state laws. (See attached charts of state legislative action on tort reform as of January 1, 1986).

State legislatures have concentrated on tort reform and now increasingly on insurance regulation because we write the law in those areas, but tort law and insurance industry practices are not the only reasons for the current "hard market" which has resulted in skyrocketing liability insurance costs. Macroeconomic policies set in Washington, particularly those that affect interest rates, I am told, may be the most important influence on the insurance market. I have also heard the theory that if the dollar weakens against the pound sterling, Lloyd's of London may expand its North American reinsurance operation, which would allow domestic insurance companies to write more policies. Each level of government has its own role to play in resolving the crisis.

As you review the reports on state legislative action on tort and insurance reform prepared by NCSL, you will see that state legislatures have been doing their part to resolve the liability insurance crisis. This is a difficult policy issue as you know. It involves balancing the legitimate demands of manufacturers and other potential defendants, including state governments, to be protected from unnecessary or unpredictable liability against the legitimate demands for compensation and justice of those who have suffered sometimes devastating injuries. State legislatures have been vigorous in their search for fair and effective policies. Different states have tried different approaches. We hope to learn from each other and from our experiences and to find ways in which we can improve and refine our existing laws.

In light of the tort reform measures already adopted in the states and in light of the capacity of the states to enact further reforms based on our cumulative experience, NCSL regards federal product liability legislation as unnecessary. NCSL has also heard convincing testimony that the proposed legislation would create problems for state and federal courts and would not necessarily achieve its stated goal of unifying product law and reducing liability insurance costs. But more fundamentally, the effect of S.2760 or similar legislation on our federal system is its most serious drawback. Such a federal product liability act would centralize a large area of the civil law and would attempt to impose uniformity at the cost of local self government, flexibility, experimentation and the other advantages of legislation by the fifty state legislatures.

S. 2760 would create confusion in our state court systems. For example, section 308 of the proposed act would eliminate joint liability for non-economic damages in product cases. Changing this rule for product liability would create confusion in multiparty litigation involving both claims of product liability and other tort claims. I urge you to contemplate how section 308 would be applied in a suit against a driver of an auto and a manufacturer or a suit against both a doctor and a drug company. For another example, section 310(b) of the proposed act would bar evidence of subsequent remedial measures in product cases. The rule in section 310(b) would result in certain key facts being admissible in many states in the trial of the unrelated claim but inadmissible in the trial of the product liability claim. There is a serious question as to whether section 310(b) in these circumstances would preclude resolution of such cases in a single trial.

I offer these examples not because either I or NCSL is critical of tort reforms which eliminate joint liability for non-economic damages or which bar evidence of subsequent remedial measures. Several states are experimenting with these reforms, and we are very interested in how they may affect rates. I offer the examples instead to illustrate the practical difficulties of imposing standardized federal rules of evidence, procedure, and liability in the context of an already existing and complex body of state law. The new federal rules would not mesh with existing law in many states.

While a federal product liability act such as S. 2760 could disrupt state court systems, it would not in our judgment necessarily provide the uniformity which its supporters allege is necessary. The novel language and new terms of art in the bill would be subject to interpretation by fifty state judicial systems. Federal court review would be allowed in diversity cases. That would result in intercircuit conflicts and lead in turn to a possible increase in the U.S. Supreme Court's caseload.

Let me provide some examples of language in S. 2760 which could easily be subject to fifty different state interpretations. Section 302 provides that a product seller will be liable when he fails to "exercise reasonable care" with the product which caused harm to the claimant. Similarly broad language is found in Section 303 which provides that punitive damages may be awarded only where there is a showing of "conscious, flagrant indifference" to safety. Section 304 provides a statute of repose for non-capital goods for the "useful safe life" of the product. Section 305 provides for counsel's liability for excessive costs attributable to conduct "calculated to delay resolution of the action" or not in "good faith." If S. 2760 is enacted, it could take years for state courts to define in the context of real cases the meaning of phrases such as "reasonable care," "conscious, flagrant indifference," "useful safe life," and "good faith." I seriously doubt at the conclusion of the process that the fifty systems would arrive at a uniform interpretation of all the language in the proposed act.

S. 2760 would not only be difficult for the states to administer but it would also constitute an unprecedented preemption of state law. NCSL opposes the legislation primarily on preemption grounds. This is in conformity with NCSL's general policy of opposition to unwarranted federal preemption of state law. The relatively unpublicized issue of preemption is one of the most serious problems facing the nation in NCSL's view. The Congress, the federal courts, and federal administrative agencies have asserted federal authority under the Supremacy Clause in an increasing number of policy areas. In recent years, the areas free from federal regulation and reserved for state legislation have decreased - some would say dramatically.

The reach of the Commerce Clause and the other enumerated powers of the federal government are, under current constitutional doctrine, almost without limit. If we are, therefore, to preserve our federal system in which communities and states manage for themselves most of their day-to-day affairs in accord with local customs and values, then Congress must adopt a policy of restraint when contemplating the preemption of state and local laws.

Congressional restraint is particularly important in light of the U.S. Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority. The Garcia decision effectively limited the Supreme Court's role in protecting constitutional federalism. The Court in Garcia reasoned that it is the primary responsibility of Congress to protect the states from intrusions into their traditional domain by the federal government.

The Court in Garcia cited James Madison's assertion in the Federalist Papers that the composition of Congress and particularly the Senate was designed to imbue the national legislature with "the spirit of the states" and make it "disinclined to invade the rights of the individual states or the prerogatives of their governments." The Justices concluded that Congress must serve as "the fundamental limitation that the Constitution imposes on the Commerce Clause to protect the states as states."

The consequences of unrestrained federal preemption at the current pace are serious. As Justice Louis Brandeis said so eloquently, "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

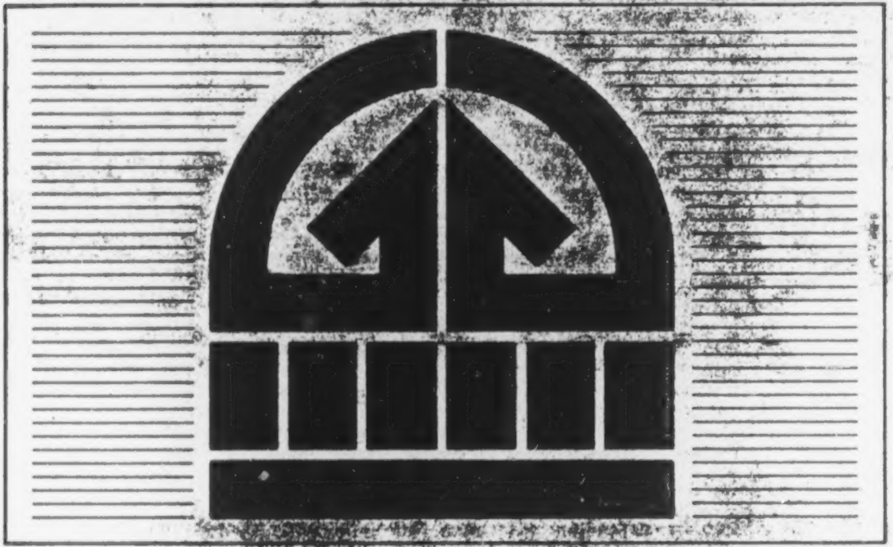
We are currently in a period of experimentation in state tort law and insurance regulation. The causes of the liability insurance crisis are not completely understood. I have already listed some of the tort reform and insurance regulation experiments in the states. I would urge you not to cut short these experiments before we have a chance to learn how best to bring down the cost of liability insurance while preserving individual legal rights.

As members of the Senate you are leaders of the national government, but you also represent your states. In a very real sense, after the Garcia decision, you are their ultimate protectors. We urge you to fulfill this historic role by adopting a policy of restraint and declining to preempt state product liability law.

1986 STATE LEGISLATIVE ACTIONS ON LIABILITY INSURANCE

	AK	AL	AR	AZ	CA	CO	CT	DE	FL	GA	HI	IA	ID	IL	IN	KS	KY	LA	MA	MD	ME	MI	MN	MO	MS	MT	NC	ND	NE	NH	NJ	NM	NY	NV	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VA	VT	WA	WI	WV	WY
AVAILABILITY																																																		
MAPs				x		x	x		x			x		x	x		x					x	x	x	x	x				x	x		x		x	x		x	x			x	x	x	x	x	x	x		
JUAs	x			x			x		x										x				x			x	x						x						x					x		x	x			
Self-Insurance	x	x		x					x	x	x	x			x					x	x		x	x			X					x	x		X						x					x	x	x	x	x
Risk Management						x						x											x	x								x																	x	
INSURANCE REGULATION																																																		
Expanded Data		x		x		x	x	x		x													x				X					x	x			x													x	
Cancellation/Nonrenewal/Premium Change Notice						x	x	x	x	x	x			x		x					x									x			x					x			x	x					x	x		x
Cancellation/Nonrenewal Only With Cause				x		x	x				x					x					x												x																x	x
Expanded Rate Review Power						x			x																		X						x																x	
Flex-Rating																																	x																	
Premium Rollbacks									x		X																X																							
Rates to Reflect Tort Reforms																																	x														x			
CIVIL JUSTICE																																																		
Itemized Jury Verdicts	x															x			x			x														x														
Frivolous Suits				x			x			x	x	X			x								x	x			X			x			x			x														x
Collateral Source Rule	x					x	x							x	x				x			x	x										x																	
Grants of Immunity/Liability Limits	x	x				x	x	x		x		X		x	x					x		x		x	x	x				x	x		x					x		x		x								x
Cap Damages/Awards	x					x			x		X					x			x	x	x	x	x	x						x											x			x			x	x	x	
Prejudgment Accrual	x																					x	x	x												x														
Joint/Several Liability	x				x	x	x		x		X			x								x								x			x											x			x		x	x
Structured Settlements	x						x		x		X	x										x											x								x			x			x			
Attorney Fees							x				X		x						x											x		x																x		
Liquor Liability				x		x	x					X	x		x			x			x	x								x		x	x		X							x		x						x
OTHER																																																		
Interim Study			x				x		x			X	x		X	x	x				x					x			x	x		x					x				x		x		x			x		
	AK	AL	AR	AZ	CA	CO	CT	DE	FL	GA	HI	IA	ID	IL	IN	KS	KY	LA	MA	MD	ME	MI	MN	MO	MS	MT	NC	ND	NE	NH	NJ	NM	NY	NV	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VA	VT	WA	WI	WV	WY

STATE LEGISLATIVE REPORT



CONTROLLING LIABILITY INSURANCE COSTS: STATE ACTIONS AND FUTURE INITIATIVES IN THE AREA OF CIVIL JUSTICE REFORM

by

Brenda Trolin

Volume 11, No. 1 January, 1986

An Information Service of the National Conference of State Legislatures
1050 17th Street, Suite 2100, Denver, Colorado 80265. Earl S. Mackey, Executive Director

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION

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ALABAMA	Ala. Code §6-5-485 (1975)
ALASKA *	Alaska Stat. §09.55.535 (Supp. 1983)
ARIZONA	--
ARKANSAS	--
CALIFORNIA	Cal. Civ. Proc. Code §1295 (West 1981)
COLORADO	--
CONNECTICUT	C.G.S.A. §§52-549 et seq. and 4-141 et seq.
DELAWARE	Chapter 682 (Arbitration Code)
FLORIDA *	-- Medical Mediation Panels ruled unconstitutional
GEORGIA	OCGA §§28-5-60 through 28-5-86
HAWAII *	Hawaii Revised Statutes, §§671-11 to 671-20
IDAHO	IC §6-1001 et seq. (medical malpractice claims)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, par. 2-611.1
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	K.R.S. Chapter 44
LOUISIANA	La. Rev. Stats. 13:5141-5157; 40:1299.41-1299.48
MAINE	14 MRSA §§1151-1155
MARYLAND *	Courts & Judicial Proceedings (CJ) Title 3, Subtitle 2 (1976)
MASSACHUSETTS *	-- See comments.
MICHIGAN	Mich. Comp. Laws Ann. §500.3051 to .3062
MINNESOTA *	Minnesota Statutes 1984, Ch. 494; see also 115B.25-115B.37 and 572.30
MISSISSIPPI	--
MISSOURI	Uniform Arbitration Act, §§435.350 to 435.470, RSMo. 1980, and H.B.1
MONTANA *	Ch. 449, L. 1977 (Title 27, Ch. 6, MCA); Ch. 684
NEBRASKA	--
NEVADA *	NRS 41A
NEW HAMPSHIRE	NHRSA 541-B
NEW JERSEY *	Yes
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	Ohio Rev. Code Ann. §2711.21 to .24
OKLAHOMA	120.S.1984 §§1801 et seq.
OREGON *	See comments.
PENNSYLVANIA *	--
RHODE ISLAND	R.I. Gen. Laws §8-17-1
SOUTH CAROLINA *	§56-11-510, et seq. of S.C. Code
SOUTH DAKOTA	--
TENNESSEE	T.C.A. §9-8-101 through 9-8-406, as to claims against state only
TEXAS *	Article 4590, §6.03, Revised Statutes
UTAH	--
VERMONT	Vt. Stat. Ann. Title 12, §7002(a) (Supp. 1982)
VIRGINIA	Va. Code §§8.01-581.1 to 581.12:2 (Supp. 1983)
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING *	Proposal to create a pretrial screening panel
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION - Comments

ALASKA
1) AS 09.43.190-.220 (arbitration of small claims)
2) AS 09.43.010-.180 (Uniform Arbitration Act)
3) AS 09.55.535 (Voluntary Arbitration of Medical Malpractice Claims)

HAWAII
Hawaii Medical Malpractice; Haw. Rev. Stat. Ch. 672, Design Professionals

MARYLAND
Health Care Malpractice Claims

MASSACHUSETTS
Maximum amount increased in area of small claims; Superior court can now remand cases to District Court for trial when amount is under $15,000.

MINNESOTA
See also Minn. Stat. §§115B.25 to 115B.37 (only for hazardous substance injury); see also Minn. Stat. 572.30.

MONTANA
Montana L. 1985 (Title 27, Ch. 5, MCA). Medical Legal Panel Act; Uniform Arbitration Act.

NEVADA
Screening panel for medical malpractice actions.

NEW JERSEY
The State Supreme Court has instituted an arbitration program for automobile negligence claims where the amount in controversy does not exceed $15,000. Any party has a right to de novo trial in Superior Court.

NEW YORK
The state may only be sued in Court of Claims (Court of Claims Act, §9). Arbitration is available in any case if all parties agree (CPLR, §7501). Medical malpractice actions must go to a medical malpractice panel (Judiciary Law, §148-a), but this does not preclude a civil trial.

OHIO
See R.C. 2711.21-2711.24 relative to medical claims arbitration. See R.C. 9.83(E) relative to administrative "compromises" of motor vehicle, watercraft, and aircraft claims against the state. See entire R.C. Chapter 2711. relative to arbitration (often contract disputes). Also see Municipal Court Superintendence Rule 15 and Common Pleas Court Superintendence Rule 15.

OREGON
Trial Court Rules establish non-binding arbitration for cases where less than $15,000 in damages are sought.

PENNSYLVANIA
Cities of Philadelphia and Pittsburgh provide arbitration for claims of $20,000 or less; others for $10,000 or less.

SOUTH CAROLINA
South Carolina Laws, 1976, as amended (Arbitration of Property Damage Liability Claims); South Carolina Supreme Court has issued rules for voluntary arbitration of appeals and disputes over attorney fees.

TEXAS
Creation of Texas Medical Disclosure Panel to determine proper disclosure for every medical and surgical procedure.

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY

ALABAMA *	--
ALASKA *	AS 09.50.250-.280; AS 09.65.070
ARIZONA	A.R.S. §12-820 et seq.
ARKANSAS	A.S.A. §12-2901
CALIFORNIA	Cal. Govt. Code §815.2
COLORADO *	24-10-101 through 118 C.R.S. (1973); H.B. 1001 (1985)
CONNECTICUT *	C.G.S.A. §4-165; §7-308; §4-160
DELAWARE *	--
FLORIDA	§768.28, Fla. Stat. Ann.
GEORGIA	Article I, Sec. II, Par. IX (Georgia Constitution)
HAWAII	Haw. Rev. Stat. §662-1 (State Tort Liability Act)
IDAHO	I.C. §6-901 et seq.
ILLINOIS *	
INDIANA *	Ind. Code 34-4-16.5-1 et seq.
IOWA	I.C.A. §525A.1; I.C.A. §613A.1
KANSAS	K.S.A. 75-6101 et seq.
KENTUCKY	K.R.S. 44.070 (Board of Claims Act)
LOUISIANA *	La. Const. Art. 12, Sec. 10 (1974); R.S. 13:5106
MAINE	14 MRSA §8101 et seq. (Tort Claims Act)
MARYLAND	Md. Code Ann. Art. 43, §12-104
MASSACHUSETTS *	Massachusetts General Laws (Chapters 258 & 258A)
MICHIGAN	Mich. Stat. Ann. §3.996 (107)
MINNESOTA *	
MISSISSIPPI	H.B. 983 (1985); M.C. §11-46-1 et seq.
MISSOURI	§537.600, RSMo (L. 1978, H.B. 1650; A.L. 1985, S.B. 323)
MONTANA *	Chapter 675, L. 1983 (2-9-206, 2-9-207, 2-9-101 MCA)
NEBRASKA	Neb. Rev. Stat. §81-8.215 et seq.; §23-2307; §23-2413
NEVADA	NRS 41.031 et seq. ($50,000 limit under NRS 41.035)
NEW HAMPSHIRE *	1985 Laws, Chapter 441; N.H. Rev. Stat. Ann. §412.3
NEW JERSEY *	N.J.S.A. Sq:1-1 et seq.
NEW MEXICO	N.M.S.A. §41-4-1 et seq.
NEW YORK	Court of Claims Act, Art. II §8; N.Y. Gen. Mun. Law §50-d
NORTH CAROLINA	N.C. §143-291; N.C. §153A-435
NORTH DAKOTA	North Dakota Century Code NDCC §32-12.1-03
OHIO *	O.R.C. §2743.01
OKLAHOMA	51 O.S.A. 1985, §151 et seq.
OREGON	ORS 30.260-30.300
PENNSYLVANIA *	42 Pa.C.S. §8522; 42 Pa. Stat. Ann. §8540
RHODE ISLAND *	R.I. Gen Laws §9-31-1; §9-31-2; §9-31-3; §9-31-4; §9-31-12
SOUTH CAROLINA *	--
SOUTH DAKOTA *	SDCL §§21-32-15 to 18
TENNESSEE	Tenn. Code Ann. §§29-20-101--29-20-407 (1980, 1985 Supp.)
TEXAS	Tex. Civ. Stat. Art. 6252-19b; Art. 6252-26
UTAH	U.C.A. §63-30-3 et seq.
VERMONT *	Vt. Stat. Ann. Tit. 12, §5601; Vt. Stat. Ann. Tit. 29, §1403
VIRGINIA	--
WASHINGTON	R.C.W. §4.92.010
WEST VIRGINIA	--
WISCONSIN *	--
WYOMING *	"Closed end" (1979) W.S. 1-39-101 through 119
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments

ALABAMA

Article I, Section 14 of the Alabama Constitution prohibits the state from being made a party in a lawsuit. The legislature cannot consent to suit against the state, but it can pass bills to appropriate money for persons injured by state actions.

Two judicial decisions -- Jackson v. City of Florence, 294 Ala. 592, 320 So.2d 68 (1975) and Lorence v. Hospital Board of Morgan County 294 Ala. 614, 320 So.2d 631 (1975) abolished local government immunity. Section 11-1-2, Code of Alabama, has established liability limits to $100,000 per claim and $300,000 per occurrence.

ALASKA

1) Claims against state
2) Suits against incorporated units of local government

COLORADO

H.B. 1001 revised governmental immunity statutes (September 15, 1985). Evans v. Board of County Commissioner, 174 Colo. 97, 482 P.2d 968 (1971).

CONNECTICUT

State sovereign immunity is not abolished; State Claims Commission hears and may approve claims but only under $5,000; municipal immunity retained except in limited circumstances.

DELAWARE

Retains sovereign immunity (Article I, Section 9 of Delaware Constitution). The Supreme Court of Delaware has held that the defense of sovereign immunity may be waived only by legislative act.

FLORIDA

Caps of $100,000/$200,000 or greater amount for which insurance is provided.

ILLINOIS

Illinois Constitution, Article XIII, Section 4 abolishes sovereign immunity except as provided by General Assembly. Ill. Rev. Stat. 1983, Ch. 127, Par. 801 provides that the state may be a party only in the Court of Claims.

INDIANA

Campbell v. State (1972) Ind., 284 N.E.2d 733

LOUISIANA

Act No. 451-R.S. 42:1441.1-1441.4; R.S. 29:23.1
Act No. 452-R.S. 13:5106; 5109(A)
Act No. 453-R.S. 9:2798.1
Act No. 454-R.S. 9:2800

MASSACHUSETTS

$100,000 cap per occurrence where immunity is waived.

MINNESOTA

Minn. Stat. §§3.732 and 3.736 (Supp. 1985) (State); Minn. Stat. Ch. 466 (Supp. 1985) (Political Subdivisions).

ABOLITION OR MODIFICATION OF SOVEREIGN IMMUNITY - Comments

MONTANA
Chapter 419, L. 1985; Chapter 389, L. 1985 (2-9-101, 2-9-107, MCA).
Sovereign immunity abolished in Constitutional Convention (1973).

NEW HAMPSHIRE
(Cont'd) §507-B:4.
$100,000 cap per occurrence where immunity is waived.

NEW JERSEY
Prohibits damages for pain and suffering except in cases of severe injury where medical expenses exceed $1,000.

OHIO

1) In the case of the State of Ohio, sovereign immunity was abolished in Am. Sub. H.B. 800 of the 110th General Assembly (Effective 1/1/75). R.C. 2743.01-2743.20.

2) In the case of Ohio's political subdivisions, sovereign immunity was abrogated by the Supreme Court in a series of decisions, but recently reestablished subject to specified areas of liability (Am. Sub. H.B. 176 of the 116th General Assembly, effective 11/20/85). R.C. 2744.01-2744.09.

PENNSYLVANIA
$500,000 cap per occurrence where immunity is waived; damages for pain and suffering prohibited except in cases of severe injury where medical expenses exceed $1,500.

RHODE ISLAND
$50,000 cap per occurrence where immunity is waived.

SOUTH CAROLINA
Doctrine of sovereign immunity was abrogated by McCall v. Batson (1985), 329 S.E.2d 741, H.B. 2266 "South Carolina Tort Claims Act" is pending.

SOUTH DAKOTA
Reinstatement and strengthening. The Governor has cancelled the state's liability policy as of December 1, 1985.

VERMONT
No liability except to extent of insurance coverage.

WISCONSIN
State employees, officers and agents can be sued in tort if the claimant complies with the notice requirements of §893.82 Stats; see also 895.52.

WYOMING
Judiciary Committee sponsoring bill for 1986 session which will further limit liability for highway design, construction and maintenance.

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY

ALABAMA	--
ALASKA	A.S. 09.16 (Alaska Uniform Contribution Among Tortfeasors Act)
ARIZONA	A.R.S. 12-2501 et seq.
ARKANSAS	--
CALIFORNIA	--
COLORADO	§13-21-111(3.5), C.R.S. H.B. 1231 (1985)
CONNECTICUT *	--
DELAWARE *	--
FLORIDA	No -- legislation proposed
GEORGIA	Enacted greater statutory protection against excessive exposure
HAWAII	No -- proposals for 1986 session
IDAHO	--
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 70, Par. 301 et seq.
INDIANA *	
IOWA *	
KANSAS	K.S.A. 60-258a
KENTUCKY	--
LOUISIANA *	La. Civil Code Art. 2324; R.S. 9:3921
MAINE *	14 MRSA §156 (comparative negligence)
MARYLAND	--
MASSACHUSETTS *	
MICHIGAN	--
MINNESOTA *	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	--
NEVADA *	NRS 41.141(3)
NEW HAMPSHIRE *	
NEW JERSEY	--
NEW MEXICO	--
NEW YORK *	--
NORTH CAROLINA	N.C. Gen. Stat. §1B-1 to 1B-6 (1983)
NORTH DAKOTA	NDCC §32-38-01
OHIO *	--
OKLAHOMA *	510.5 1984, §154(E)
OREGON	ORS 18.440 - 18.460 (Contribution Among Joint Tortfeasors)
PENNSYLVANIA *	See comments.
RHODE ISLAND *	R.I. Gen. Laws §10-6-3 (see 9-20-4)
SOUTH CAROLINA	--
SOUTH DAKOTA	--
TENNESSEE	--
TEXAS *	Chapters 32 and 33, Civil Practice & Remedies Code
UTAH	Enacted greater statutory protection against excessive exposure
VERMONT	Eliminated the concept of joint and several liability
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	Legislation proposed - repeal of doctrine
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

*See Comments.

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

CONNECTICUT

Retains state sovereign immunity; State Claims Commission hears and may approve claims under $5,000; municipal liability retained (except in limited circumstances).

DELAWARE

State waives immunity but mandates insurance coverage; retains sovereign immunity for local governmental immunities and provides a $300,000 cap per occurrence where immunity is waived (see §1515, Tit. 6).

INDIANA

Eliminated the concept of joint and several liability: abolished effective 1/1/85.

IOWA

Generally, there is joint and several liability, but not with respect to defendants who are found to bear less than 50% of the total fault assigned to all parties.

LOUISIANA

Generally, there is joint and several liability but not where defendant's fault is less than that of the plaintiff, in which case defendant is liable only to the extent of own fault.

MAINE

$300,000 cap per occurrence where immunity is waived.

MINNESOTA

Generally, joint and several liability, but if plaintiff's negligence is greater than that of any of several defendants, plaintiff cannot recover at all from that defendant.

NEVADA

Generally, joint and several liability except that a defendant who is less at fault than the plaintiff is liable only for that portion of the judgment which represents the percentage of negligence attributable to him.

NEW HAMPSHIRE

Eliminated the concept of joint and several liability. $100,000 cap per occurrence where immunity is waived.

NEW YORK

See Civil Practice Law and Rules (CPLR) 1404.

OHIO

Based upon computer searches of Ohio court decisions and statutes, this state still has instances of joint and several liability (see memo R-114-2395, which still is generally correct. However, the effect of the doctrine may be mitigated in some cases by Ohio's contributions among joint tortfeasors statutes (R.C. 2307.31-2307.32, see memo's appendices) and possibly by the comparative negligence statute (R.C. 2315.19). See also these cases: Barry v. Schorling, 2 Ohio App.3d 110 (1981); Lattea v. Akron, 9 Ohio App.3d 118 (1982); and National Mutl. Ins. Co. v. Whitmer, 70 Ohio St.2d 149 (1982).

ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY - Comments

OHIO, Cont'd

Recent legislation places a cap of $250,000 per person and $500,000 per occurrence, as well as a limitation on recovery for pain and suffering to cases of wrongful death or substantial permanent disability/disfigurement and $5,000 in medical expenses.

OKLAHOMA

No joint and several liability except where damages cannot be apportioned.

PENNSYLVANIA

Generally, joint and several liability except where plaintiff's fault is greater than a defendant's in which case the defendant is liable only for the percentage attributable to him.

RHODE ISLAND

$50,000 cap per occurrence where immunity is waived.

TEXAS

Generally, joint and several liability, but if plaintiff's negligence is greater than that of any of several defendants, plaintiff cannot recover at all from that defendant.

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE

ALABAMA	--
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	A.R.S. 12-565 (medical malpractice only)
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	P.A. 85-574
DELAWARE	--
FLORIDA	§672.7372 Fla. Stat. (automobile cases only)
GEORGIA	--
HAWAII	--
IDAHO	--
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA	--
MAINE	17-A MRSA §1322
MARYLAND	--
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 42.020 (limited in scope)
NEW HAMPSHIRE	--
NEW JERSEY *	N.J.S.A. 59:9-2
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	N.C. Gen. Stat. §8C-1, Rule 411
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	§10.5 (1984), §153(D)
OREGON *	Yes
PENNSYLVANIA	42 Pa.C.S.A. §8553(d)
RHODE ISLAND	R.I. Gen. Laws §9-19-34 (medical malpractice only)
SOUTH CAROLINA	--
SOUTH DAKOTA	--
TENNESSEE	--
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ABOLITION OR MODIFICATION OF COLLATERAL SOURCE DOCTRINE - Comments

MASSACHUSETTS

Domenic Corsetti, et al. v. The Stone Company, et al., 396 Mass. 1 (September 19, 1985). Admission of collateral source evidence is a matter for the Trial Judge. Evidence may be admitted to contradict plaintiff's testimony that his injury had caused him loss of money and where relevant to his motive for staying out of work.

NEW JERSEY

Gives public entities a credit for all collateral sources except for life insurance.

NEW YORK

Civil Practice Law & Rules 4545 - actions for medical and dental malpractice and certain actions against public employers.

OHIO

Based upon computer searches of Ohio court decisions and statutes, Ohio still generally follows this doctrine. See Shearer v. Motorists Mut. Ins. Co., 53 Ohio St.2d 1 (1978); Suchy v. Moore, 29 Ohio St.2d 99 (1972); and Pryor v. Webber, 23 Ohio St.2d 104 (1970). See also Evidence Rule 411 (inadmissibility of liability insurance information). However, in the recent political subdivision sovereign immunity act, there is a requirement of the disclosure and deduction of insurance and other collateral benefit sources (R.C. 2744.05(B)); additionally, R.C. 2305.27 relates to limited consideration of collateral benefits in "medical claims" cases; and, finally, recoveries against the State of Ohio in the Court of Claims must be reduced by insurance, disability awards, and other collateral benefits (R.C. 2743.02(D)).

OREGON

1) O.R.S. 18.500-18.530 (advance payment by or on behalf of tortfeasor)
2) O.R.S. 743.792(7) (uninsured motorist coverage in motor vehicle liability policy)
3) O.R.S. 743.800-743.835 (Personal injury benefits protection in motor vehicle liability policy)

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE

5

ALABAMA	--
ALASKA *	A.S. 09.50.280; A.S. 45.45.010
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	C.S.G.A. §52-192a
DELAWARE	--
FLORIDA	--
GEORGIA	--
HAWAII *	H.R. Stat. §636-16; see also H.R. Stat. §661-68
IDAHO	I.C. §28-22-104
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	K.S.A. 16-205
KENTUCKY	--
LOUISIANA	La. Civil Code Art. 2924;La. Rev. Stat. 13:5112 and 13:5117
MAINE	14 MRSA §§1427-1430
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	Minn. Stat. §549.09 (Supp. 1985)
MISSISSIPPI	--
MISSOURI	--
MONTANA	Chapter 523, L. 1985 (27-1-210, MCA)
NEBRASKA	--
NEVADA	N.R.S. 17.130(2)
NEW HAMPSHIRE	--
NEW JERSEY *	Rule of Court - R. 4:42-11
NEW MEXICO	--
NEW YORK *	Civil Practice Law & Rules 5001, 5002, 5003
NORTH CAROLINA	N.C.Gen. Stat. §24-5
NORTH DAKOTA *	Yes
OHIO *	Yes
OKLAHOMA	12 O.S. Supp. 1985, §727; 36 O.S. Supp. 1985, §3629
OREGON	--
PENNSYLVANIA	Pa. R.C.P. 238
RHODE ISLAND	R.I. Gen. Laws §9-21-10
SOUTH CAROLINA	§34-31-20, S.C.R.S.
SOUTH DAKOTA	S.D.C.L. §21-1-11
TENNESSEE	--
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	--
WYOMING	
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF PREJUDGMENT INTEREST ACCRUAL PRINCIPLE - Comments

ALASKA
State v. Phillips, 470 P.2d 266 (1970)

HAWAII
Prejudgment interest may accrue as early as date of injury.
H.R.S. §662-2 (no prejudgment interest against state).

NEW JERSEY
Public entities do not pay prejudgment interest. N.J.S.A. 59:9-2.

NEW YORK
Interest in tort actions, except certain actions dealing with property, is available from verdict, report or decision to judgment and upon judgment.

NORTH DAKOTA
North Dakota Century Code §32-03-04 only applies to situations where damages are certain or capable of being made certain by calculation and generally applies to contract actions. However, it is conceivable that if the plaintiff could show damages with some degree of certainty, i.e., legal malpractice, negligent bailment, etc., this statute would be applicable in a negligence action. However, North Dakota has not expressly adopted the prejudgment interest accrual principle.

WISCONSIN
Provisions for interest accrual from date of settlement offer - see §807.01 Stats.

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES

ALABAMA	--
ALASKA	--
ARIZONA	--
ARKANSAS	--
CALIFORNIA	Cal. Civ. Code §3333.2 (West. Supp. 1984)
COLORADO	--
CONNECTICUT	--
DELAWARE	--
FLORIDA	-- Legislation proposed.
GEORGIA	--
HAWAII	Hawaii Rev. Stat. Ch. 294 ("no fault" statute for autos and vehicles)
IDAHO	--
ILLINOIS	--
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA *	La. Rev. Stats. 13:5106; 13:5149 (punitive damages) (cont'd in commer
MAINE	18-A M.R.S.A. §2-804 (wrongful death action)
MARYLAND	--
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	§§383.075 to 383.083, R.S.Mo. Supp. 1985 (H.B. 657 and 337)
MONTANA *	Chapter 507, L. 1985 (27-1-221, MCA)
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY *	--
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	R.C. 2744.05(C); R.C. 2307.43
OKLAHOMA	--
OREGON	--
PENNSYLVANIA *	42 Pa.C.S.A. §8528
RHODE ISLAND	--
SOUTH CAROLINA	--
SOUTH DAKOTA	S.D.C.L. §21-3-11
TENNESSEE	T.C.A. §147-14-123 (1984) (as to claims against state only)
TEXAS	Article 4590, Section 11.02, Revised Statutes
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	Sec. 893.82(6)
WYOMING *	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF LIMITS ON NON-ECONOMIC DAMAGES - Comments

LOUISIANA
(Cont'd) La. Rev. Stats. 40:1299.39; 40:1299.42 and 40:1299.43.

MASSACHUSETTS
Limits under Tort Claims Act $100,000; in Highway Defect Cases as to Commonwealth of Massachusetts, $5,000; and on malpractice cases considered as to total damages.

MONTANA
Generally, statute providing immunity for all non-economic damages was overturned by state Supreme Court (1983). However, this amendment was passed in 1985 session in response to the increasing number of wrongful termination cases being filed, partially as a result of the Montana Supreme Court's recognition of a number of causes of action related to termination of employment.

NEW JERSEY
No limitations except for claims under wrongful death statute. N.J.S.A. 2A-31-1 et seq.

NEW YORK
Limitation of exclusion of damages only in the case of workers' compensation (Workers' Compensation Law Section 11) and no-fault automobile insurance (Insurance Law Section 5104).

OHIO
No statute applicable to all tort cases, but in the recent political subdivision sovereign immunity act, there is a $250,000 cap on non-economic damages in civil actions other than wrongful death actions (R.C. 2744.05(C)). The Ohio Constitution prohibits caps in wrongful death cases (Article I, Section 19A). There also is a $200,000 cap in medical malpractice (nondeath) cases, which may apply to economic as well as non-economic damages and may be subject to constitutional challenge (R.C. 2307.43).

PENNSYLVANIA
Subject to attack on constitutional grounds; issue in state Supreme Court; Lyles v. Philadelphia.

TEXAS
Medical malpractice found unconstitutional in Baptist Hospital of Southeast Texas v. Baber, 672 S.W.2d 296 (Tex. App. Beaumont 1984, writ granted).

WISCONSIN
Applies only to limits of $250,000 per claimant for each state employee sued and denial of punitive damages.

WYOMING
Proposal to eliminate constitutional prohibition (Article X, Section 4, Wyoming Constitution.

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS

ALABAMA	Ala. Code §6-5-486 (1975)
ALASKA	A.S. 09.55.548 (medical malpractice only)
ARIZONA	--
ARKANSAS	Ark. Stat. Ann. §34.2619 (Supp. 1983)
CALIFORNIA	Cal. Civ. Proc. Code §667.7 (West 1980)
COLORADO	--
CONNECTICUT	--
DELAWARE	Del. Code Ann. Tit. 18 §6864 (Supp. 1984)
FLORIDA *	§768.57 Fla. Stat. (1985)
GEORGIA	--
HAWAII *	--
IDAHO	--
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, Par. 2-611.1
INDIANA *	Yes
IOWA	--
KANSAS	Kan. Stat. Ann. §60-2609 (1983)
KENTUCKY	--
LOUISIANA	La. Rev. Stats. 13:5114 (Act No. 45) 450
MAINE	--
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	Minn. Stat. 3.736 et seq.
MISSISSIPPI	--
MISSOURI	--
MONTANA *	Yes
NEBRASKA	--
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY	--
NEW MEXICO	--
NEW YORK *	Civil Practice Law & Rules 50-A
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA	--
OREGON	--
PENNSYLVANIA	--
RHODE ISLAND	R.I. Gen. Laws §28-33-25 (workers' compensation only)
SOUTH CAROLINA *	--
SOUTH DAKOTA *	--
TENNESSEE *	Tenn. Code Ann. §7-51-202 (1985); §9-8-307 (1985 Supp.) (see commen
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	-- Proposed legislation
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF PROVISIONS OF STRUCTURED AWARDS - Comments

FLORIDA
Structured awards for future losses in excess of $500,000 against health care providers.

HAWAII
Bills introduced in last session were rejected. Will be introduced again in 1986 session.

INDIANA
Permitted by custom and practice, not by statute or case law.

MONTANA
Workers' Compensation Law specifically provides for structured awards in 39-71-741, MCA (Chapter 471, L. 1985). No other statutory provisions, but method is commonly judicially applied in civil law cases.

NEW YORK
Only in medical and dental malpractice cases.

OHIO
No bill has been passed on the subject, but proposals are being considered. In Ohio's courts, structured settlements/awards have occurred without legislation on the books. See, however, the installment payments provisions in the recent political subdivision sovereign immunity act (R.C. 2744.06(B) and (C)).

SOUTH CAROLINA
Structured settlements are permitted by custom and practice, not by legislation.

SOUTH DAKOTA
Proposals for 1986 session similar to California statute regarding periodic payments for medical malpractice awards.

PENALTIES FOR FILING FRIVOLOUS SUITS

ALABAMA	--
ALASKA	A.S. 09.55.536 (medical malpractice only)
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO *	13-17-101 through 106. C.R.S. (1973 and 1985 Supp.) (see comments)
CONNECTICUT	C.G.S.A. §§52-240a; 52-568
DELAWARE	--
FLORIDA *	§57.105 Fla. Stat.
GEORGIA	--
HAWAII	H.R. Stats., §§294-31; 607-14.5
IDAHO	I.R.C.P. Rule 54(e)
ILLINOIS	Public Act 84-7. Ill. Rev. Stat., Ch. 110, Par. 2-611.1
INDIANA	Ind. Code 34-4-16.5-19
IOWA	--
KANSAS	-- Statutory provisions are seldom used.
KENTUCKY	--
LOUISIANA *	Yes
MAINE	--
MARYLAND	--
MASSACHUSETTS	Mass. Gen. Laws Ch. 258, §11; Mass. Gen. Laws Ch. 231, §6F
MICHIGAN	--
MINNESOTA	Minn. Stat. 1984, §549.21
MISSISSIPPI *	-- See comments.
MISSOURI	§514.205, RSMo (S.B. 5, 1985)
MONTANA	--
NEBRASKA	--
NEVADA *	N.R.S. 18.010(2)
NEW HAMPSHIRE	--
NEW JERSEY	--
NEW MEXICO	--
NEW YORK	Civil Practice Law & Rules 8303-a
NORTH CAROLINA	N.C. Gen. Stat. §6-21.5
NORTH DAKOTA	N.D.C.C. §28-26-01
OHIO *	-- See comments.
OKLAHOMA	--
OREGON	--
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA *	--
SOUTH DAKOTA	-- Proposed for 1986 session
TENNESSEE	Tenn. Code. Ann. §27-1-122 (1980) (frivolous appeals)
TEXAS	Chapter 105, Civil Practice & Remedies Code
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	§814.025 Stats.
WYOMING *	--
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

PENALTIES FOR FILING FRIVOLOUS SUITS - Comments

COLORADO

24-10-110(s), C.R.S. (1973), S.B. 182 (1984) - Penalties for filing frivolous suits. State Court Administrator's Office conducted a survey of use of frivolous lawsuits and found that judges do not invoke frivolous lawsuit legislation very often. A major weakness in such legislation lies in the stipulation that it cannot be used if the lawsuit involves a question of fact. In particular, whenever a party can bring in an expert witness, the issues which he testifies about become issues of fact, and as a result the frivolous lawsuit legislation cannot be used even if the action is frivolous.

FLORIDA

Awarding attorneys' fees to prevailing party where "complete absence of justiciable issue of either law or fact."

LOUISIANA

La.R.S. 3:3605; R.S. 42:11; R.S. 46:1820; R.S. 49:146
Louisiana Code of Civil Procedure Articles 863, 864 and 2164

MISSISSIPPI

See Rule 11q of Mississippi Rules of Civil Procedure.

NEVADA

Amended (1985), allows recovery of attorneys' fees when complaint "was brought with reasonable ground."

NORTH CAROLINA

Attorneys' fees awarded if court finds absence of justiciable issue.

OHIO

Under the Ohio Business Opportunity Plans Law and Consumer Sales Practices Law, the penalty of an attorney's fees award is available for groundless, bad faith actions (R.C. 1334.09 and 1345.09). In tort cases in general, there does not appear to be a general frivolous suit/penalty statute. Appellate Rule 23, however, permits courts of appeals to impose attorney's fees and court costs as penalties in the case of frivolous appeals. Additionally, in connection with frivolous tort civil actions, common law remedies (such as malicious prosecution actions) might be available against former plaintiffs who filed frivolous suits, but Ohio is strict relative to malicious prosecution recoveries. See Clermont Environmental Reclamation Co. v. Hancock, 16 Ohio App.3d (1984).

The frivolous suit issue has arisen in the past in Ohio relative to medical malpractice cases (see memo R-112-2782). The question has at times been whether attorneys as well as their clients should be pursued for frivolous suits. No legislative enactments have resulted, but several years ago legislation was discussed that would have imposed attorney's fees/court costs penalties for filing frivolous civil actions or appeals. Finally, see the memo R-116-1327 relative to attorney's fees awards in Ohio; also bear in mind that, in Ohio, prevailing parties in civil actions generally are awarded court costs under Civil Rule 54(D).

SOUTH CAROLINA

Rules of Procedure No. 54 allows costs to be allocated to prevailing party.

WISCONSIN

This section is of limited value because findings by a court that an action is frivolous requires the court report the attorney filing the action to the bar association, and judges are reluctant to do so.

WYOMING

Rules Committee of the Supreme Court is considering adoption of Fed. Rules Cuv. Proc. Rule 11.

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS

ALABAMA	--
ALASKA	Yes
ARIZONA	A.R.S. 12-820 et seq. (modified 1984)
ARKANSAS	--
CALIFORNIA	--
COLORADO	24-10-118, C.R.S (1973 and 1985 Supp.)
CONNECTICUT	C.G.S.A. §§4-160; 4-165
DELAWARE	Del. Code Ann. Tit. 10 §4011
FLORIDA *	§768.28(9)(a), Fla. Stat.
GEORGIA	--
HAWAII	Haw. Rev. Stat. §26-35.5
IDAHO	I.C. §6-901 et seq.
ILLINOIS	Ill. Rev. Stat. 1983, Ch. 85, Par. 101-1 et seq.
INDIANA	Ind. Code 34-4-16.5-3 (limited immunity)
IOWA	--
KANSAS	K.S.A. 75-6101 et seq. (Tort Claims Act)
KENTUCKY	-- Common law in effect.
LOUISIANA *	Yes
MAINE	14 M.R.S.A. §8101 et seq. (Tort Claims Act)
MARYLAND	Yes
MASSACHUSETTS *	Yes
MICHIGAN	--
MINNESOTA	Minn. Stat. 3.736 et seq.
MISSISSIPPI	H.B. 983 (1985) §11-46-1 et seq.
MISSOURI *	§537.035 (1985 H.B. 357); State Legal Expense Fund (see comments)
MONTANA	Chapter 530, L. 1983 (2-9-305, MCA)
NEBRASKA	--
NEVADA	N.R.S. 41.032; 41.033
NEW HAMPSHIRE	--
NEW JERSEY	N.J.S.A. 59:1-1 et seq.
NEW MEXICO	--
NEW YORK	--
NORTH CAROLINA	--
NORTH DAKOTA	N.D.C.C. §32-12.1-03
OHIO *	R.C. 9.85, 9.86, 2743.02; 2744.03(A)(6)
OKLAHOMA *	Yes - see comments.
OREGON	O.R.S. 30.265
PENNSYLVANIA	Case law: Pine v. Synkonis et al.
RHODE ISLAND	R.I. Gen. Laws §§91-127; 5-34-34; 45-16-5
SOUTH CAROLINA *	--
SOUTH DAKOTA	S.D.C.L. §§21-32-17 and 18
TENNESSEE	T.C.A. §9-8-307(h)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN *	1985 Wisconsin Act 47, Section 4 (125.035)
WYOMING	
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

ESTABLISHMENT OF IMMUNITY FOR GOVERNMENT EMPLOYEES AND OFFICIALS - Comments

FLORIDA

Provides for immunity for acts in scope of employment, unless acting in bad faith, with malicious purpose, or in manner exhibiting wanton and willful disregard of human rights, safety, or property.

LOUISIANA

Louisiana Revised Statutes 9:2798.1, 13:5108.1 and 13:5108.2, 29:23.1, 40:1299.39, 42:1441.1-1441.4. This list does not include special statutes covering specific officers and functions.

MASSACHUSETTS

Massachusetts General Laws, Chapter 258 (public employees)
Massachusetts General Laws, Chapter 33 (national guard)
Massachusetts General Laws, Chapter 111C, Section 14 (medics rendering assistance in emergencies)
Massachusetts General Laws, Chapter 119, Section 51A (social workers and other mandated reporters immune from suit for filing report of suspected child abuse)

MISSOURI

(Cont'd) §§105.711 to 105.726 (S.B. 275, 1983)

OHIO

1) For state employees, see qualified immunity provisions of R.C. 9.85, 9.86, and 2743.02.
2) For political subdivision employees, see the recent political subdivision sovereign immunity act (R.C. 2744.03(A)(6).

OKLAHOMA

1) 19 O.S. 1981, §371
2) 63 O.S., §683.14
3) 57 O.S., §553
4) 11 O.S., §§29-108 and 37-121
5) 22 O.S., §371
6) 11 O.S., §23-104

SOUTH CAROLINA

McCall v. Batson, Supra, contains some language on the subject of immunity for government officials. H.B. 2266 (pending) contains provisions on this issue.

WISCONSIN

Statute was recently enacted in response to Appellate Court decisions holding liquor dispensers liable.

MODIFICATION OF DRAM SHOP LAWS

ALABAMA	--
ALASKA *	A.S. 04.21.020
ARIZONA	No statute; found in case law.
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	--
DELAWARE	--
FLORIDA *	768.125 Fla. Stat.
GEORGIA	--
HAWAII	--
IDAHO	--
ILLINOIS	Ill. Rev. Stat. 1983. Ch. 43. Par. 135
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	--
LOUISIANA	--
MAINE *	17 M.R.S.A. §2002
MARYLAND	--
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA *	Laws of Minnesota 1985. Ch. 309. §12 and 13
MISSISSIPPI	--
MISSOURI	§537.053 (S.B. 345)
MONTANA *	--
NEBRASKA	--
NEVADA *	--
NEW HAMPSHIRE	--
NEW JERSEY *	--
NEW MEXICO	§41-11-1 N.M.S.A. (1978)
NEW YORK *	General obligations
NORTH CAROLINA	N.C. Gen. Stat. §18-B-305 (1983)
NORTH DAKOTA *	--
OHIO *	R.C. Chapter 4399
OKLAHOMA	--
OREGON	O.R.S. 30.950. 30.960
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA *	
SOUTH DAKOTA *	S.D.C.L. §§35-11-1 and 35-6-27: 35-4-78: 35-6-27: 35-11-2
TENNESSEE	Yes
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	W.S. 12-8-301 (1985)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

MODIFICATION OF DRAM SHOP LAWS - Comments

ALASKA
Liability of liquor licensee only for "criminal negligence" (1983)

FLORIDA
Limits liability to sale of alcohol to minors or knowingly to persons addicted to use of alcoholic beverages.

MAINE
Reduce liquor liability.

MINNESOTA
Compare: Minn. Stat. §340.95 (1984) and Minn. Stat. §340A.801 (Supp. 1985)

MONTANA
An unsuccessful attempt was made in 1985 (H.B. 395).

NEVADA
"Dram shop" laws are not recognized in Nevada.

NEW JERSEY
Proposed bill to limit liability of bars and retail liquor establishments for injuries to inebriated persons. Their liability to third parties injured by drunk persons would remain unchanged.

NEW YORK
No substantial modification of dram shop law in recent years; 1983 law cited above added coverage to persons under the legal drinking age.

NORTH DAKOTA
No change, but citation for dram shop laws: N.D.C.C. §5-01-06.

OHIO
See R.C. Chapter 4399; it is a limited law. A recently introduced bill, H.B. 733 of the 116th General Assembly, would increase civil liability (R.C. 4399.18); H.B. 488 also relates to the subject.

SOUTH CAROLINA
Christiansen v. Campbell, (1985), 328 S.E.2d 351, recognized civil liability of seller of alcoholic beverage who sells to intoxicated person in violation of penal statutes prohibiting such sales. H.B. 2802 (pending) pertains to this issue.

SOUTH DAKOTA
Abrogation of dram shop laws.

MODIFIED STATUTE OF LIMITATIONS

ALABAMA *	Yes
ALASKA	--
ARIZONA	--
ARKANSAS	--
CALIFORNIA	--
COLORADO	--
CONNECTICUT	§§52-577a; 52-577b and 52-577c; P.A. 84-407; P.A. 84-287
DELAWARE	--
FLORIDA *	§95.11(4), F.S., providing 2 years from discovery (cont'd in comments)
GEORGIA	--
HAWAII	--
IDAHO	Limitations Tort Claims Act revised 1985, I.C. 6-901 et seq.
ILLINOIS *	--
INDIANA	Ind. Code 34-1-1-2
IOWA	--
KANSAS	K.S.A. 60-501 et seq.
KENTUCKY	--
LOUISIANA	--
MAINE *	14 M.R.S.A. §§752-A (design professionals), (cont'd in comments)
MARYLAND	Courts & Judicial Proceedings (CJ) §5-109 (actions against physicians)
MASSACHUSETTS	--
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	H.B. 63 (1985)
MISSOURI *	§516.140 (H.B. 225, 1985); §516.030 (1983, S.B.44 & 45); (see comments
MONTANA	--
NEBRASKA	--
NEVADA	N.R.S. 41A.097 (regarding health care providers)
NEW HAMPSHIRE	
NEW JERSEY *	See comments.
NEW MEXICO	--
NEW YORK	C.P.L.R., §214-a; medical or dental malpractice
NORTH CAROLINA *	--
NORTH DAKOTA	N.D.C.C. Ch. 28-01
OHIO *	
OKLAHOMA	510.S.1984 §156(B)
OREGON *	O.R.S. 30.275
PENNSYLVANIA	Yes
RHODE ISLAND	--
SOUTH CAROLINA *	Section 15-3-545
SOUTH DAKOTA	Chapters 15-2 and 15-2a
TENNESSEE	T.C.A. §29-26-116 (1980) (medical malpractice)
TEXAS *	§16.008; Article 4590, §10.011
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	W.S. 1-3-107 (1976)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

MODIFIED STATUTE OF LIMITATIONS - Comments

ALABAMA

Statute of limitations in certain civil lawsuits and workers' compensation were increased as part of a workers' compensation compromise.

ACT 85-39)
ACT 85-41) 1984 2nd Special Session

FLORIDA

(Cont'd) not to exceed four years for medical malpractice, two years for professional malpractice, two years for wrongful death. Generally, four years for torts (§95.11(3) F.S.).

ILLINOIS

See, generally, Ill. Rev. Stat. 1983, Ch. 110, Par. 13-101.

MAINE

(Cont'd) 752-B (ski areas); 752-C (sexual acts); 753 (doctors and lawyers).

MISSOURI

(Cont'd) §516.170 (S.B. 44 & 45, 1983); §516.350 (S.B. 468, 1982).

NEW JERSEY

No, except that a claimant against a public entity must file a notice of claim within 90 days of the accrual of his cause of action.

NORTH CAROLINA

See N.C. Gen. Stat. §1-15(c) (1983) (malpractice).

OHIO

See R.C. 2743.16 (two years generally against the state); R.C. 2744.04 (two years generally against political subdivisions); R.C. 2305.11 (medical malpractice actions precluded four years after act or omission occurred, despite general statute of limitations of one year after the cause of action arose (discovery rule)); and 2305.131 (a statute of repose relative to defective and unsafe real property improvements).

OREGON

Established a two-year limitation for filing claims against the state or state employees.

SOUTH CAROLINA

Medical malpractice only; S. 153 providing for architects' limitation on liability is pending.

TEXAS

Neagle v. Nelson, 678 S.W.2d 918 (Tex. 1984); Nelson v. Krusen, 685 S.W.2d 11.

LIMITATIONS ON ATTORNEY CONTINGENCY FEES

ALABAMA	--
ALASKA	--
ARIZONA	Ariz. Rev. Stat. Ann. §12-568 (1982)
ARKANSAS	--
CALIFORNIA	Cal. Bus. & Prof. Code §6146 (West. Supp. 1984)
COLORADO	--
CONNECTICUT	--
DELAWARE	Del. Code Ann. Tit. 18 §6865 (Supp. 1984)
FLORIDA *	Suits against state agencies §768.28(8) Fla. Stat.
GEORGIA	--
HAWAII *	Yes
IDAHO	Idaho Code §39-4213 (1976)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110
INDIANA	Ind. Code Ann. §16-9.5-5-1 Par. 2-611.1
IOWA	Iowa Code Ann. §147.138 (West. Supp. 1984-85)
KANSAS	Kan. Stat. Ann. §7-1216 (1982)
KENTUCKY	--
LOUISIANA	--
MAINE	--
MARYLAND *	Yes
MASSACHUSETTS *	--
MICHIGAN	--
MINNESOTA	--
MISSISSIPPI	--
MISSOURI	--
MONTANA	--
NEBRASKA	Neb. Rev. Stat. §44-2834 (1978)
NEVADA	--
NEW HAMPSHIRE	--
NEW JERSEY	Regulated by Supreme Court R. 1:21-7
NEW MEXICO	--
NEW YORK	Judiciary Law 474-a
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	--
OKLAHOMA *	Yes
OREGON *	O.R.S. 752.150 (limited to medical, surgical, dental treatment,
PENNSYLVANIA	--
RHODE ISLAND	--
SOUTH CAROLINA	--
SOUTH DAKOTA	-- Proposal for 1986 session
TENNESSEE	T.C.A. §29-26-120 (1980) (medical malpractice)
TEXAS	--
UTAH	--
VERMONT	--
VIRGINIA	--
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING	-- (limitations by Wyoming Supreme Court, 1977)
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

* See Comments.

LIMITATIONS ON ATTORNEY CONTINGENCY FEES - Comments

FLORIDA
Also Section 768.575, F.S., provides guidelines for reasonable fees, including percentage of recovery.

HAWAII
Hawaii Revised Statutes, Section 671-2 (applies only to medical torts and limits contingent fees to a "reasonable amount as approved by a court of competent jurisdiction").

MARYLAND
Partial (for suits against state government).

MASSACHUSETTS
Except in cases of Industrial Accident Board (20%) and victims of violent crime (15%).

OHIO
There is no general statutory limitation on chargeable attorney contingency or hourly fees in tort cases; in some civil cases, attorney's fees may be subject to regulation (e.g., workers' compensation cases) or to court approval. However, attorney's fees generally are required to be reasonable under the Code of Professional Responsibility applicable to Ohio's attorneys.

A recently introduced bill, H.B. 694 of the 116th General Assembly, would limit recoverable or payable attorney's fees in civil actions against political subdivisions of Ohio.

OKLAHOMA
Oklahoma Bar Association Advisory Opinion #26 (fee limitation of 50% or less).

OREGON
(Cont'd) omission, operations.

Mr. **Herman**. Thank you, Mr. Zuccaro.

As you have heard from Senators on both sides of the aisle this morning, the question of Federal preemption is certainly not a matter that anybody takes lightly. But disregarding for a moment the question of whether the Federal Government should preempt State tort law, and also disregarding any particular piece of legislation, S. 2760 or any others, would you not agree that our current product liability system burdens interstate commerce as was suggested by Mr. Broyhill, or that it at least affects interstate commerce?

Mr. **Zuccaro**. I think it clearly affects interstate commerce as do many other areas of State concern. And I think the courts have traditionally recognized that States have a right to establish within their own boundaries laws and regulations with regard to how business is going to be conducted in those States as long as the State regulations and the State laws are not discriminatory, and as long as they do not create an undue burden on interstate commerce.

And ultimately, so long as they are adopted to affect a policy of legitimate local public interest and public concern. I think viewed in those terms, yes, this area does certainly affect interstate commerce.

Mr. **Herman**. So you would agree that the issue at hand is not a constitutional one, it is one of propriety and policy?

Mr. **Zuccaro**. In light of some of the recent cases from the Supreme Court, I would say that is so.

Mr. **Herman**. Thank you.

One other question, if I can follow up on that.

Are you aware of the fact that product liability insurance rates are set on an interstate basis, not on a State-by-State basis?

Mr. **Zuccaro**. I was not specifically aware of it, although I do not believe that there has been any indication as to potential reductions, specifically that would result from the adoption of this proposed legislation.

Mr. **Herman**. Thank you.

The next witness is Mr. Philip Jay Hermann, the chairman of the Board of Jury Verdict Research, Inc.

STATEMENT OF PHILIP J. HERMANN

Mr. **Hermann**. Actually it is a research organization, not a reporting organization. And we are an impartial research organization.

We collect most of the verdicts rendered by jurors throughout the country. We collect the facts and we analyze them. And the first thing that I must tell you is that the jury system is well and functioning well, notwithstanding what was said here.

We do have extreme verdicts where the jury does go bad. But those are the exception. And we have a court process that frequently takes good care of it by the way of remittitor or error proceedings of various kinds. So extreme verdicts are not a serious problem, really. In fact, when you see what jurors—how they handle things, it is amazing. They do a very, very good job.

There was also mention here that verdicts are not predictable. That is not so. Jurors are surprisingly predictable. They are more predictable when it is a jury of 12 people than 9, and 9 more so than a jury of 6. Because it is the background of the community. We find that what the juries did in the past, we can use to predict what they are going to do in the future on the same valid basis as do the life expectancy tables. Life tables will not tell you what is going to happen to the one individual, but they are going to tell you what is going to happen to a group of people. Likewise expectancy tables have been working well.

And we also have to remember that only about, as far as we can ascertain, 3 out of 100 cases filed in court go through verdict. The number of cases that are settled without litigation we do not know. I tried to get the facts, but we have reason to believe that a larger number of cases are settled without litigation than are filed. The problem is not the jury system. What happened is you might say in product liability, is growing pains. I am happy to report that when you see the analysis, you will find that a lot of it, shows the problems are being taken care of.

Now, what has happened is this: Product liability, as we know today, is very new, it is emerging. Product liability in itself is complex with amazing diversity of products, and causes of the action. This is all very new. And this is what creates the problems. You take a busy law firm of plaintiff lawyers, for example. They may not have two product cases the same. It is not like automobile, where they have a bunch of rear enders, cervical injury, same kind of severity. So in automobile cases they can easily evaluate them. But in product liability cases what has happened is that rather than try to evaluate because each is unique, they put it into a lawsuit, figuring that the court process and the opposing side is going to help them evaluate. Product liability is very complex. You will see in my report that I have, with Marianna Smith, who is the executive director of ATLA, we have itemized the amount of time necessary to handle a product liability case. And the time and expense is amazing. And product litigation frequently takes many years. Seven years is not unusual.

Now, what happened was that many insurance companies established premiums without realizing verdicts were rapidly increasing, then an accident occurs, and it may take 7 years before the claim is resolved. Now, it was not so much, as was said here, that they cut the rates. It was not usually that. It was many insurance companies did not know what was happening with verdicts.

Now, let me point out to you this: In 1976, the average jury verdict was increasing at 6.5 percent. Then verdicts started going up 17 percent, 24 percent and in 1981 30-percent increase each year. Then verdicts started down. We are now down to 12-percent increase and probably lower this year already. They seem to increase as medical costs increase.

Now, a lot of insurance companies did not know this. So they did not kick up the reserves on the pending cases. They did not increase their premium. And then, all of a sudden the past year, year and a half, they found out what was happening. Let us take a case that brought a $100,000 verdict in 1978. In 1985, that same case jurors were awarding a $233,000 verdict.

So, all of a sudden, insurance companies discovered that they had to pay out a lot more money than they had expected. They got panicky, they had to kick up their reserves. They found they had less capacity to write policies. They started canceling policies, doubling and tripling premiums. Had they kept abreast of what juries were doing they would have instead gradually increased their premiums.

Now I want to point out, jury verdicts have increased 15 percent a year over many years. This is, as one speaker here pointed out, was the exact increase in the medical costs—15 percent. So that is no surprise, that verdicts have increased to the same extent.

Now, what is happening is this: If you will look at the overview of time and cost factors table, you will see that plaintiff lawyers, if they do not settle a case right away—that is before litigation—the enormous amount of time required for depositions, witnesses, and expense that goes in a law suit, instead of making more money as the litigation progresses, they get to the point where, by the time they try the case or it is ready for trial, they are losing money. Litigous lawyers are not making anything on litigated cases. When they cover their out-of-pocket expenses, and their overhead, they have nothing left.

Now more and more lawyers are beginning to discover that they have to evaluate and settle their cases before filing, or certainly immediately after. The insurance companies are discovering the same thing. With verdict inflation that is going on, and will continue, undoubtedly, they have to settle early as possible. And we see this happening.

One of the speakers said you cannot predict verdicts. That is not true. Our verdict expectancy tables are surprisingly valid. We have a large data bank and the insurance companies and lawyers are increasingly calling on it. They are increasingly working out settlements, and we see this growing greatly. So I submit to you, that although we have a crisis, it is in process of being solved. The crisis is simply growing pains caused by a new type of action—product liability—that has become predominant in our litigation.

[The statement follows:]

JURY VERDICT RESEARCH, INC.
5325 NAIMAN PARKWAY - SUITE B • SOLON, OHIO 44139 • 1-800-321-6910

September 22, 1986

United States Senate
Strom Thurmond, Chairman
Committee on the Judiciary
Washington, DC 20510

Dear Mr. Thurmond:

Enclosed you will find a completly revised report containing numerous tables that I did not have time to prepare prior to my testimony before your committee. If you look at these charts you will note that they cost and chart the effect upon the injured party, the plaintiff and the cost to insurance companies in defense, as well, as the cost of not arranging as prompt settlement as possible. You will note that I was assisted in the preperation of the charts by Marianna Smith, Executive Director of ATLA, and Robert J. Weil, of Altman & Weil Management Consultants.

I believe, it would be important, for each member of your committee, as well as the counsel to have a copy of this. We would either arrange to have this reproduced, or in about two weeks I expect to have printed copies with all the charts and so forth.

I would appreciate your thoughts.

Sincerely,

Philip J. Hermann

PJH/jaf

enc.

- Personal Injury Valuation Handbooks
- Personal Injury Case Evaluation Service
- Verdict Reviews
- National Verdict Survey
- Verdict Survey for your state
- Personalized Verdict File Search
- Personalized Verdict Reporting Service
- Special Verdict Research
- Expert Witness Testimony
- JVR Concise PI Medical Dictionary
- Lawyer's Register by Specialties and Fields of Law

REPORT TO THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

TESTIMONY ON PRODUCT LIABILITY

"How To Help Take The Crisis Out Of Product Liability"

Philip J. Hermann
Chairman of the Board
Jury Verdict Research, Inc.

September 9, 1986

HOW TO HELP TAKE THE CRISIS OUT OF PRODUCT LIABILITY

The Senate Committee on the Judiciary has requested that I testify concerning the so-called insurance crisis, with special emphasis upon product liability. I shall not repeat any of my testimony given to the Subcommittee on Economic Stabilization of the Committee on Banking, Finance and Urban Affairs of the U.S. House of Representatives. I enclose herein a copy of that testimony as part of this report.

It is clear from the many inquiries that we receive from the legal profession, insurance companies, and self-insurers that by far the most troublesome claims to evaluate for settlement purposes involve product liability. In the reports of verdicts and settlements that we see, it is also clear that product liability generates considerable unnecessary litigation and numerous gross overpayments.

We see many instances where a final demand that is well within the actuarial verdict value of a personal injury claim is spurned, only to be greeted by a verdict many times the size. Likewise, we frequently see settlements where the insurance company or self-insured pays many times the actuarial value. If these were isolated occurrences, it would not be of concern, but they are not. They represent frequent and costly occurrences.

The basic problem with product liability is not the tort system, not the juries, not the lawyers, not the insurance companies, not the self-insurers. The basic problem is that product liability is complex, with amazing diversity due to newly developed products and new technology, for which liability is often in the process of emerging. This creates difficult handling and valuation problems that many insurance companies and lawyers cannot efficiently cope with. Fortunately, if we take an analytical look at the root causes of the crisis in product liability, we can, to a large measure, solve this crisis without major reforms to the tort system.

Product liability injuries and claims are caused by an extremely wide variety of products that cause injury in numerous ways. The injured party may, to some extent, be the cause of his own injury. The product may cause injury with or without any fault on the part of the manufacturer or those that sell and service it. The cause may not be known or understood. Whether there is legal liability for the injury may not have been determined. Liability determined in one jurisdiction may not have been ruled on or established in others.

Products that can and do cause injury are almost endless in number. The consumer may be injured by household appliances, ladders, power garden tools, sports equipment, toys, furniture, foods and beverages, drugs, contraceptives, intrauterine devices, vaccines, clothing, pharmaceutical devices, beauty products, toiletries, elevators, escalators, guns, ammunition, explosives, aircraft, boats, and vehicles. The worker may be injured by machine tools, presses, heavy machinery, hand tools, cranes, hoists, industrial and construction vehicles, farm equipment, and industrial chemicals, to name just a few.

Product liability, as we know it today, is of comparatively recent origin. It wasn't long ago that a manufacturer was generally held responsible only if he were negligent in the manufacture of a product. The doctrines of strict liability and of negligent design are of recent origin. In fact, at the 1965 annual American Bar Association meeting, I presented the paper prepared by John Hill of Texas which noted the emergence of strict liability, based on one case, and gave it its name. Because there are so many ways that the same products can cause injury, a new approach to liability emerges virtually every day.

There is nothing new or harmful about emerging liability. It has been going on in our legal system for generations. The difference is that many lawyers and insurance executives are used to a legal system that has changed slowly with respect to tort liability and that has involved mainly large numbers of policies with few and similar causation factors, such as automobile, homeowner, and boating accidents.

Insurance, of course, begins with the underwriter. The complexity and diversity of products that may be involved and the questions of unsettled legal liability have made it more difficult for the insurance underwriter to decide what and what not to underwrite and what premiums to charge. Unlike the underwriter for automobiles, he cannot look at the experience of thousands and perhaps millions of policies in his own company. In deciding to underwrite a small or medium-sized company for product liability, he does not have available the depth of previous experience, nor does he deal with large numbers of similar assureds.

Although the job of underwriting is more difficult, it is by no means impossible. It can be done with a reasonable expectation of success. It does, however, mean that the underwriter must be aware of all factors that may result in claims, their nature, and the probable payout. He must be alert to changes, including the increase in the size of jury verdicts, so that he can adjust the premiums accordingly. Because of the diversity of product liabilities, no company (except for a few, such as insurers of drug manufacturers) at present has the in-depth experience that is desirable for sound underwriting. While a large national data bank and verdict expectancy tables are available to assist them, many companies have not yet availed themselves of these resources.

When the insurance company receives notice of an accident, not only must it investigate to determine liability and injury, it must also determine the anticipated cost and expense to dispose of the claim. Arriving at a realistic value for the claim reserve is no easy task for product liability claims. The occurrence may be unique to the person determining the reserve figure. He may have little idea what a jury would do with the liability and injury facts and what it might cost the company. Further, as the claim is pending and additional information arrives, he must make appropriate changes. These include changes for the annual rise in verdict size.

The plaintiff's attorney has had much the same evaluation problem. Even if he is a busy, personal injury specialist, each product liability claim may be unique to him. What the jury may do as to liability may be a big question mark to him. The injury may not be the kind that he sees with any frequency. He may not have any first-hand reports of similar cases tried to a verdict.

This dilemma may be contrasted to that involving automobile accident claims where the attorney may see many cervical and low back injuries caused in rear-end collisions. Being familiar with liabilities, injuries, and trial results in similar cases, he can place a valid price on the claim and probably dispose of it without filing suit. But what should he ask for a product liability claim? He may consult the available verdict actuarial tables for liability and injury, as many attorneys do. Too often, he will rely only on the partially educated guess.

From our vantage point of examining reports of most of the verdicts rendered by jurors in personal injury cases throughout the country, we observe much of the last stages of the valuation and negotiation process. The attorney who relies on the partially educated guess may demand far less than a jury would probably award. More than likely, he will ask too much, on the assumption that even though he may be too high, the insurance company or its defense attorneys, in the bargaining process, may help him to arrive at a more valid settlement figure.

What he and so many other attorneys are doing is relying on the negotiation and litigation process to evaluate claims. But this is a very costly process to the lawyer and to the insurance carrier, and it is often not in the best interest of the client. Consider the overview of time costs to the plaintiffs and the cost factors to litigate a complex, commonly observed, workplace product liability claim with serious injury that is handled by an experienced trial lawyer, which overview immediately follows.

AN OVERVIEW OF TIME & COST FACTORS

To Litigate A Complex, Commonly Observed Workplace Product Liability Claim With Serious Injury Handled By An Experienced Trial Lawyer

Because of the large diversity in product liability claims, none can be referred to as typical. We have used as an example, a workplace product liability claim since most product liability claims appear to arise from the use of machines and equipment in the workplace. The assumption here is that this hypothetical case is not as complex as many that arise in the workplace, nor anywhere near that of complex litigation, such as for aircraft. The estimates of lawyer time required and out-of-pocket expenses were arrived at jointly by Marianna Smith, Executive Director of the American Trial Lawyers Association and Philip J. Hermann, Chairman of the Board of Jury Verdict Research, Inc.

The information on non-lawyer overhead costs and lawyer billable time was furnished through the courtesy of Robert J. Weil of Altman and Weil, management consultants. This firm made a cost survey of over 400 law firms. They found that for firms with 2-8 lawyers, the average non-lawyer overhead last year was $59,608 per lawyer. For 9-20 lawyer firms, they found the amount to be $62,475. The 2-8 lawyer figures were selected because that size appears to be typical of the average firm that devotes most of its time to representing plaintiffs for personal injuries. Weil was of the opinion that, although the survey revealed various figures for billable time, the estimated actual client work time for partners per year was 1,200-1,400 hours, and for non-partner lawyers, 1,400-1,600 hours. We used 1,400 hours, since most firms consist of both partners and non-partners. We then determined that the average overhead for each hour of lawyer time was $42.58.

In using 1,400 hours per year as chargeable hours, we are assuming that each hour used on client's business is fee productive. Admittedly, this is not a fully valid assumption. We have not taken into consideration non-productive time used to interview injured persons, investigate the claim, make studies of law, and even confer with insurance company representatives prior to deciding whether or not to handle the claim. The percentage of claims that are rejected because they lack merit is not known, but it appears to represent a significant number of hours. In addition, the claim as a lawsuit may be rejected by the court before or after trial. Again, this frequency is not known, but it probably also represents a substantial amount of time not compensated.

You will, note from the time estimates for work required, that we have used what we have determined to be the minimum amount of time required. The term "high minimum" simply refers to a higher estimate of the minimum time required. Although we refer to our hypothetical case as being complex, many product liability cases are far more complex. Cases involving depositions from outside the locality or involving extensive legal research require far more actual lawyer time than outlined in our example.

Out-of-pocket expenses are quite variable. For example, the purchase of the machine that caused the injury, or one similar to it, may be required. Expert witness fees vary widely. The assumption here (probably a very conservative one) is that witnesses and depositions are able to be handled on a local level. Many cases require depositions out of the jurisdiction, out of the state, and out of the country.

Litigate C

Out-of-pocket expenditures include court reporter fees to take depositions, writing up depositions, preparing exhibits, photographs, transcripts of trial testimony, expert witness fees and expenses, attorney travel expenses to take depositions and consult witnesses, medical expert witnesses for examinations, reports, preparation for depositions, attendance at depositions, non-medical expert witnesses' expenses, expenses for conferences, preparation for trial, attendance at trial, writing up, and testimony for appeal.

Today it is not unusual to encounter in a single case, even before trial, out-of-pocket expenses of $100,000.

SUMMARY: ESTIMATED TOTAL TIME, OVERHEAD, & EXPENDITURES TO LITIGATE

	Minimum	High Minimum
Total Lawyer Hours: Minimum	581	
Total Lawyer Hours: High Minimum		760
Total Non-Lawyer Overhead @ 42.58 x 581	$24,739	
Total Non-Lawyer Overhead @ 42.58 x 760		$32,361
Total Estimated Out-Of-Pocket Expenditures	$31,500	- $58,500
TOTAL ESTIMATE COST FACTORS	$56,239	- $90,861

ITEMIZATION OF SUMMARIZED TIME, OVERHEAD, & EXPENDITURES TO LITIGATE

PRIOR TO SUIT

	Hours
Interviews with client	2-3
Investigation, site visitation, and identification and interview of witnesses (1-2 only), with the assumption that all are local	8-24
Examination of product and consultation with expert witnesses, with the assumption that all are local	24
Study of the law	8
Compilation of client's medical & related expenses	2
Evaluation of data	4
Negotiations for settlement: 2-3 meetings	20

Total Hours: Minimum	68
Non-Lawyer Overhead @ 42.58 x 68 hours	$2,895
Total Hours: High Minimum	85
Non-Lawyer Overhead @ 42.58 x 85 hours	$3,619
Estimated Out-Of Pocket Expenditures	$3,000 - 5,000

SUIT TO PRE-TRIAL

		Hours
Preparation of petition		4
To scene; view & examine machine and its operation; interview employees if permitted); take photographs		6
Consultation with experts		10
Interrogatories preparation		4
Answer defendant's Interrogatories		8
Study defendant's answers to Interrogatories		4-6
Depositions: preparation & attendance with the assumption that all are local; 8-12 hours each, using 10 hour average		120-140
plaintiff	1	
plaintiff's experts	3-4	
plaintiff's medical records	1-3	
defendant company	2	
defendant's non-medical experts	3-4	
defendant's medical experts	1-3	
defendant's employees	3	
hospital records	0-1	
Motions & Hearings: preparation of documents		4-12
Conference regarding preparation of exhibits		12
Study of the law		8
Preparation for pre-trial, evaluation of depositions and study		16-20
Attendance at pre-trial		4

Total Hours: Minimum	220
Non-Lawyer Overhead @ 42.58 x 220 hours	$ 9,367
Total Hours: High Minimum	294
Non-Lawyer Overhead @ 42.58 x 294 hours	$12,519
Estimated Out-Of-Pocket Expenditures	$12,000 - 30,000

Litigate F

PREPARATION FOR TRIAL

	Hours
Round up, prepare witnesses, study files and depositions of all plaintiff and defense witnesses	60-100
Additional studies of law	5-15
Court room appearance	4- 8

Total Hours: Minimum	69
Non-Lawyer Overhead @ 42.58 x 69 hours	$2,938
Total Hours: High Minimum	123
Non-Lawyer Overhead @ 42.58 x 123 hours	$5,237
Estimated Out-Of-Pocket Expenditures	$4,000 - 6,000

TRIAL

	Hours
Two week trial: 75 hours per week, (often involving Saturday and Sunday time) which includes preparation time before and after court appearances and studies of law	150

Total Hours: Minimum	150
Total Hours: High Minimum	150
Non-Lawyer Overhead @ 42.58 x 150 hours	$ 6,387
Estimated Out-Of-Pocket Expenditures	$10,000 - 15,00

POST TRIAL

MOTIONS FOR NEW TRIAL, REMITTITUR

	Hours
Briefs & study of transcripts & law	20
Court appearances	2-4
Total Hours: Minimum	22
Non-Lawyer Overhead @ 42.58 x 22 hours	$ 937
Total Hours: High Minimum	24
Non-Lawyer Overhead @ 42.58 x 24 hours	$ 1,022
Estimated Out-Of-Pocket Expenditures	-0-

COURT OF APPEALS

	Hours
Briefs, transcripts & study of law	50-80
Court appearance	2-4
Total Hours: Minimum	52
Non-Lawyer Overhead @ 42.58 x 52 hours	$2,214
Total Hours: High Minimum	84
Non-Lawyer Overhead @ 42.58 x 84 hours	$3,577
Estimated Out-Of-Pocket Expenditures	$2,500

As you can see, the cost of handling a product liability, personal injury case involves considerable time and expense.

Even a reasonable demand, not backed with credible evidence of how it was arrived at, may be rejected by some insurance carriers. An experienced insurance adjuster, who may also be a claims manager or claims supervisor, may have the same evaluation problems as the trial lawyer. He can (and for serious injury cases, will) receive assistance from the home office. But the home office may often have the same valuation problems and may employ partially educated guesses with little confidence. So as not to risk overpayment, such claims personnel may authorize an amount that is grossly inadequate to move the claim. They, too, will be relying on the litigation and negotiation process to evaluate, and, hopefully, to work out, a reasonable settlement. This leaves the plaintiff's trial attorney with no alternative other than to enter suit. The insurance company must refer the lawsuit to its defense lawyers - unless, of course, it reviews its position and works out a settlement.

The insurance company (and self-insured) will, of course, incur defense costs upon referral of the lawsuit. We will not consider the insurance company's overhead costs to supervise the lawsuit. We will only consider the charges for services and out-of-pocket expenses that are billed to the carriers by their defense counsel.

The following is an overview of cost factors to defend a complex, commonly observed, workplace product liability claim with serious injury that is handled by an experienced defense lawyer.

AN OVERVIEW OF TIME & COST FACTORS

To Defend A Complex, Commonly Observed
Workplace Product Liability Claim With Serious Injury
Handled By An Experienced Trial Lawyer

Please refer to the introductory information outlined in the "Overview Of Time & Cost Factors To Litigate" the lawsuit on behalf of the plaintiff. That information is applicable, and the assumptions are basically the same. However, rather than provide the lawyer's overhead costs, we will provide information concerning billings to the carrier.

Altman and Weil, management consultants, surveyed law firms generally, and they included personal injury insurance defense firms in that survey. Robert Weil was of the opinion that the typical lawyer-associate used in defense work has four years of experience. The charges for such associate's time per hour were as follows: lower 25% range @ $65; middle 50% range @ $70; and upper 25% range @ $75. We are using $70 an hour as an average.

Defend A

Weil reported that for lawyer-partners, with 10-15 years of experience, the billing rates were $75, $90, and $110. For senior partners with 25-30 years of experience, the range was $95, $110, and $130. We are using $110 an hour, as a product liability suit of the magnitude of our hypothetical product liability case would ordinarily require the services of a senior partner.

Weil's survey revealed that partners and shareholders (some law firms are organized as corporations) engaged in insurance defense work reported a median taxable income of $117,164, while their associates reported $44,537. The partner's income also includes profit (if any) on associate's billing. However, if we assume 1,400 billable hours each year, and we divide 1,400 into $117,164, the net hourly return is $83.69 per billable hour.

The real hourly return, however, appears to be far less. We have not included the large number of non-billable hours usually spent by a senior partner in hiring and training associates, in running and developing his practice, in professional and civic activities, and in keeping abreast of legal developments. These, along with his billable time, frequently exceed 2,000 hours. For 2,000 hours, the hourly return is $58.58.

Defend B

What percentage of the case can be handled by a partner and what percentage can be handled by an associate will, of course, vary from law firm to law firm and from lawsuit to lawsuit. We will use three alternate assumptions, each of which is frequently seen: one-third associate time, two-third partner time; two-thirds associate time, one-third partner time; and associate and partner time at one-half each.

We are estimating lawyer time on the assumption that even at trial, the trial lawyer will be alone, assisted only by a paralegal, or, to a very limited extent, by an associate lawyer. Actually, many trial lawyers, especially in trial, feel that they need the assistance of an associate (some may use even two associates).

Another defense cost that is frequently billed directly to carriers is for paralegal's time. Robert Weil reports that for firms of 2-8 lawyers, the ratio of paralegals to lawyers is .23. For firms of 9-40 lawyers, the ratio .20, or one paralegal for every five lawyers. The average billing rate is $40 an hour.

Defend C

We will use the ratio of .20, chargeable at $40 an hour, as that appears to be applicable to paralegals employed by defense firms. According to Weil, paralegals appear to average 1,304 chargeable hours a year; we will use 1,300 hours.

Although many carriers may consult, or even involve, their outside counsel prior to the suit being referred, we will assume that the initial lawyer involvement is upon referral of the lawsuit.

The following tables summarize the estimated minimum time and expense involved in the defense of a complex, commonly observed, workplace product liability claim with serious injury.

SUMMARY: ESTIMATED TOTAL MINIMUM TIME & EXPENDITURES TO DEFEND

These estimates are conservative and reflect both the minimum as well as the high minimum estimates of time required.

	ESTIMATED HOURS		ESTIMATED COST	
	Minimum	High Minimum	Minimum	High Minimum
TOTAL LAWYER HOURS	523.5	700		
2/3 Partner Time @ $110	349	467	$38,390	$51,370
1/3 Associate Time @ 70	174.5	233	12,215	16,310
Paralegal Time @ 40	105	140	4,200	5,600
Out-Of-Pocket Expense			19,500	28,500
ESTIMATED COST TO INSURANCE COMPANY			$74,305	$101,780
1/2 Partner Time @ $110	261.5	350	$28,765	$38,500
1/2 Associate Time @ 70	261.5	350	18,305	24,500
Paralegal Time @ 40	105	140	4,200	5,600
Out-Of-Pocket Expense			19,500	28,500
ESTIMATED COST TO INSURANCE COMPANY			$70,770	$97,100
1/3 Partner Time @ $110	174.5	233	$19,195	$25,630
2/3 Associate Time @ 70	349	467	24,430	32,690
Paralegal Time @ 40	105	140	4,200	5,600
Out-Of-Pocket Expense			19,500	28,500
ESTIMATED COST TO INSURANCE COMPANY			$67,325	$92,420

Defend E

SUMMARY OF TIME & EXPENDITURES TO DEFEND

RECEIPT OF SUIT THROUGH FIRST PRE-TRIAL

	ESTIMATED HOURS		ESTIMATED COSTS	
	Minimum	High Minimum	Mimimum	High Minimum
TOTAL LAWYER HOURS	220.5	307		
2/3 Partner Time @ $110	147	205	$16,170	$22,550
1/3 Associate Time @ 70	73.5	102	5,145	7,140
Paralegal Time @ 40	44	61	1,760	2,440
Out-Of-Pocket Expense			3,000	5,000
ESTIMATED COST TO INSURANCE COMPANY			$26,075	$37,130
1/2 Partner Time @ $110	110	153.5	$12,100	$16,885
1/2 Associate Time @ 70	110	153.5	7,700	10,745
Paralegal Time @ 40	44	61	1,760	2,440
Out-Of-Pocket Expense			3,000	5,000
ESTIMATED COST TO INSURANCE COMPANY			$24,560	$35,070
1/3 Partner Time @ $110	73.5	102	$ 8,085	$11,220
2/3 Associate Time @ 70	147	205	10,290	14,350
Paralegal Time @ 40	44	61	1,760	2,440
Out-Of-Pocket Expense			3,000	5,000
ESTIMATED COST TO INSURANCE COMPANY			$23,135	$33,010

ITEMIZATION OF TIME

	TOTAL HOURS	
	Minimum	High Minimum
Telephone call by referring person usually giving a brief overview and asking questions	.5	1

(RECEIPT OF SUIT THROUGH FIRST PRE-TRIAL)

	TOTAL	HOURS
Receipt of suit papers and insurance company file; study of file; prepare answers to Petition and Interrogatories to plaintiff; analysis and letter to insurance company	5	7
Indentify and contact various expert witnesses; discuss needs; engage expert witnesses (1-3 only); letter to expert witnesses relating facts	4	7
Telephone conferences with appropriate office of defendant company; arrange to confer with various technical people and inspect machinery; visit to company (assume local) and conference with various company personnel, etc.	6	12
Arrange and view plaintiff's machine (assume local) with defendant company personnel and expert witnesses; photograph	5	10
Study of law	3	8
Conference with plaintiff's attorney	2	4
Study and evaluation of material furnished by plaintiff's attorney, medical reports, specials, etc.; report to company and telephone conference with insurance company	4	8
Telephone conferences with defendant company personnel	3	5
Work on answer to plaintiff's Interrogatories	5	12
Study plaintiff's answer to defendant's Interrogatories	4	6
Depositions: preparation & attendance with the assumption that all are local; 8-12 hours each, using a 10 hour average	120	140

(RECEIPT OF SUIT THROUGH FIRST PRE-TRIAL)

		TOTAL	HOURS
Depositions:			
plaintiff	1		
plaintiff's experts	3-4		
plaintiff's medical records	1-3		
defendant company	2		
defendant's non-medical experts	3-4		
defendant's medical experts	3		
hospital records	0-1		
Motions & hearings: preparation of documents		4	12
Conferences regarding preparation of exhibits		12	12
Study of law		8	8
Letters to insurance company; (status reports)		14	18
Preparation for pre-trial, evaluation of depositions and study of law		16	20
Telephone conference with insurance company		1	1
Attendance at pre-trial		4	4

Defend H

PREPARATION FOR TRIAL

	ESTIMATED HOURS Minimum	HOURS High Minimum	ESTIMATED COSTS Minimum	COSTS High Minimum
TOTAL LAWYER HOURS	74	128		
2/3 Partner Time @$110	49	85	$ 5,390	$ 9,350
1/3 Associate Time @ 70	25	43	1,750	3,010
Paralegal Time @ 40	15	26	600	1,040
Out-Of-Pocket Expense			4,000	6,000
ESTIMATED COST TO INSURANCE COMPANY			$11,740	$19,400
1/2 Partner Time @ $110	37	64	$ 4,070	$ 7,040
1/2 Associate Time @ 70	37	64	2,590	4,480
Paralegal Time @ 40	15	26	600	1,040
Out-Of-Pocket Expense			4,000	6,000
ESTIMATED COST TO INSURANCE COMPANY			$11,260	$18,560
1/3 Partner Time @ $110	25	43	$ 2,750	$ 4,730
2/3 Associate Time @ 70	49	85	3,430	5,950
Paralegal Time @ 40	15	26	600	1,040
Out-Of-Pocket Expense			4,000	6,000
ESTIMATED COST TO INSURANCE COMPANY			$10,780	$17,720

ITEMIZATION OF TIME

	TOTAL	HOURS
Round up, prepare witnesses, study files and depositions of all plaintiff and defense witnesses	60	100
Additional studies of law	5	15
Letters to insurance company, defendant, & telephone conferences	5	5
To court room appearance	4	8

Defend I

TRIAL

	ESTIMATED	TIME	ESTIMATED	COST
	Minimum	High Minimum	Minimum	High Minimum
TOTAL LAWYER HOURS	150	150		
2/3 Partner Time @ $110	100	100	$11,000	$11,000
1/3 Associate Time @ 70	50	50	3,500	3,500
Paralegal Time @ 40	30	30	1,200	1,200
Out-Of-Pocket Expense			10,000	15,000
ESTIMATED COST TO INSURANCE COMPANY			$25,700	$30,700
1/2 Partner Time @ $110	75	75	$ 8,250	$ 8,250
1/2 Associate Time @ 70	75	75	5,250	5,250
Paralegal Time @ 40	30	30	1,200	1,200
Out-Of-Pocket Expense			10,000	15,000
ESTIMATED COST TO INSURANCE COMPANY			$24,700	$29,700
1/3 Partner Time @ $110	50	50	$ 5,500	$ 5,500
2/3 Associate Time @ 70	100	100	7,000	7,000
Paralegal Time @ 40	30	30	1,200	1,200
Out-Of-Pocket Expense			10,000	15,000
ESTIMATED COST TO INSURANCE COMPANY			$23,700	$28,700

ITEMIZATION OF TIME

	TOTAL	HOURS
Two week trial: 75 hours per week (often involving Saturday and Sunday time) which includes preparation time before and after court appearances, studies of law, and telephone conferences with the insurance company and with the assured	150	150

POST-TRIAL

MOTION FOR NEW TRIAL, REMITTITUR

	ESTIMATED	TIME		ESTIMATED	COST	
	Minimum	High	Minimum	Minimum	High	Minimum
TOTAL LAWYER HOURS	25		27			
2/3 Partner Time @ $110	17		18	$ 1,870		$ 1,980
1/3 Associate Time @ 70	8		9	560		630
Paralegal Time @ 40	5		5.5	200		220
Out-Of-Pocket Expense				-0-		-0-
ESTIMATED COST TO INSURANCE COMPANY				$ 2,630		$ 2,830
1/2 Partner Time @ $110	12.5		13.5	$ 1,375		$ 1,485
1/2 Associate Time @ 70	12.5		13.5	875		945
Paralegal Time @ 40	5		5.5	200		220
Out-Of-Pocket Expense				-0-		-0-
ESTIMATED COST TO INSURANCE COMPANY				$ 2,450		$ 2,650
1/3 Partner Time @ $100	8		9	$ 880		$ 990
2/3 Associate Time @ 70	17		18	1,190		1,260
Paralegal Time @ 40	5		5.5	200		220
Out-Of-Pocket Expense				$ -0-		-0-
ESTIMATED COST TO INSURANCE COMPANY				$ 2,270		$ 2,470

ITEMIZATION OF TIME

	TOTAL	HOURS
Briefs & study of transcripts & law	20	20
Letters and telephone conference with insurance company	3	3
Court appearances	2	4

POST-TRIAL

COURT OF APPEALS

	ESTIMATED TIME		ESTIMATED COST	
	Minimum	High Minimum	Minimum	High Minimum
TOTAL LAWYER HOURS	54	88		
2/3 Partner Time @ $100	36	59	3,960	6,490
1/3 Associate Time @ 70	18	29	1,260	2,030
Paralegal Time @ 40	11	18	440	720
Out-Of-Pocket Expense			2,500	2,500
ESTIMATED COST TO INSURANCE COMPANY			$ 8,160	$11,740
1/2 Partner Time @ $110	27	44	2,970	4,840
1/2 Associate Time @ 70	27	44	1,890	3,080
Paralegal Time @ 40	11	18	440	720
Out-Of-Pocket Expense			2,500	2,500
ESTIMATED COST TO INSURANCE COMPANY			$ 7,800	$11,140
1/3 Partner Time @ $110	18	29	1,980	3,190
2/3 Associate Time @ 70	36	59	2,520	4,130
Paralegal Time @ 40	11	18	440	720
Out-Of-Pocket Expense			$ 2,500	$ 2,500
ESTIMATED COST TO INSURANCE COMPANY			$ 7,440	$10,540

ITEMIZATION OF TIME

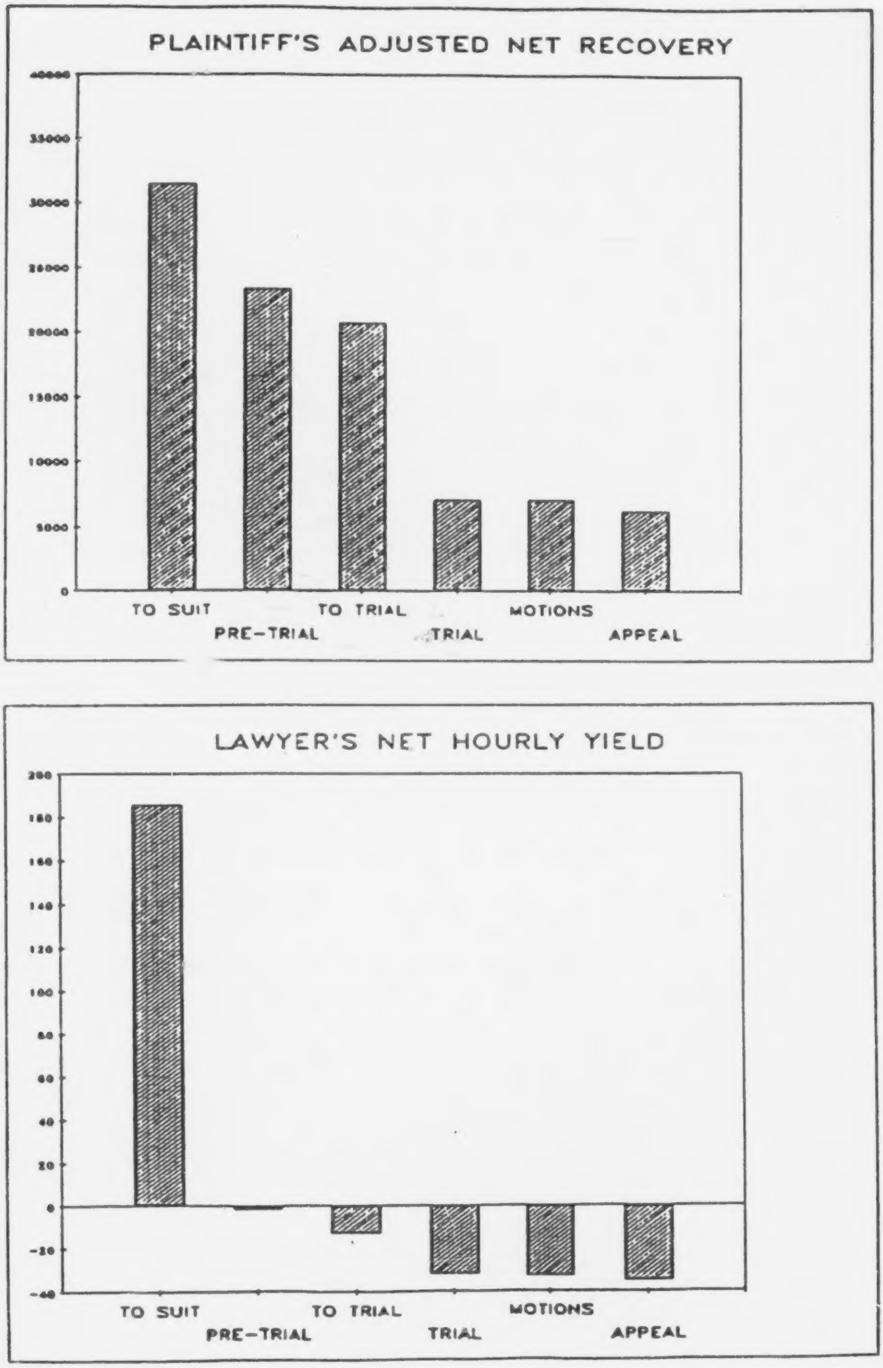
	TOTAL	HOURS
Study of transcripts and preparation of Brief, & study of law	50	80
Letters & telephone conferences with insurance company	2	2
Court appearances	2	4

Many insurance companies, in the hope of avoiding the costs of litigation, make careful, valid evaluations of their claims and make offers based upon such evaluations. Unfortunately, too many plaintiff attorneys, not having actuarial information available, are not aware that the offer by the defense is in line with the verdict expectancy and should be accepted. The failure of plaintiff attorneys to recommend the acceptance of fair settlement offers, or the refusal of the plaintiff to accept that recommendation, reduces the net yield to the plaintiff and also reduces the attorney's net hourly yield.

Let's examine the size of settlements or awards that we see with some frequency in these types of cases - $50,000, $100,000, $200,000, and $500,000. The assumption is that the insurance company, knowing that its offer is realistic, does not increase that offer as the claim proceeds through litigation.

The following tables are premised on a conservative estimate, using only the minimum time necessary to handle the claim.

TABLE 1: $50,000 SETTLEMENT OR AWARD



ITEMIZATION OF PRO RATA SETTLEMENT OR AWARD

TABLE 1 $50,000

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$ 50,000	50,000	50,000	50,000	50,000	50,000
OUT-OF-POCKET	$ -3,000	-15,000	-19,000	-29,000	-29,000	-31,500
Net	$ 47,000	35,000	31,000	21,000	21,000	18,500
* Less 43%	$ 0	0	0	-9,030	-9,030	-7,955
ADJUSTED NET	$ 47,000	35,000	31,000	11,970	11,970	10,545

* Adjustment for actuarial probability of defense verdict

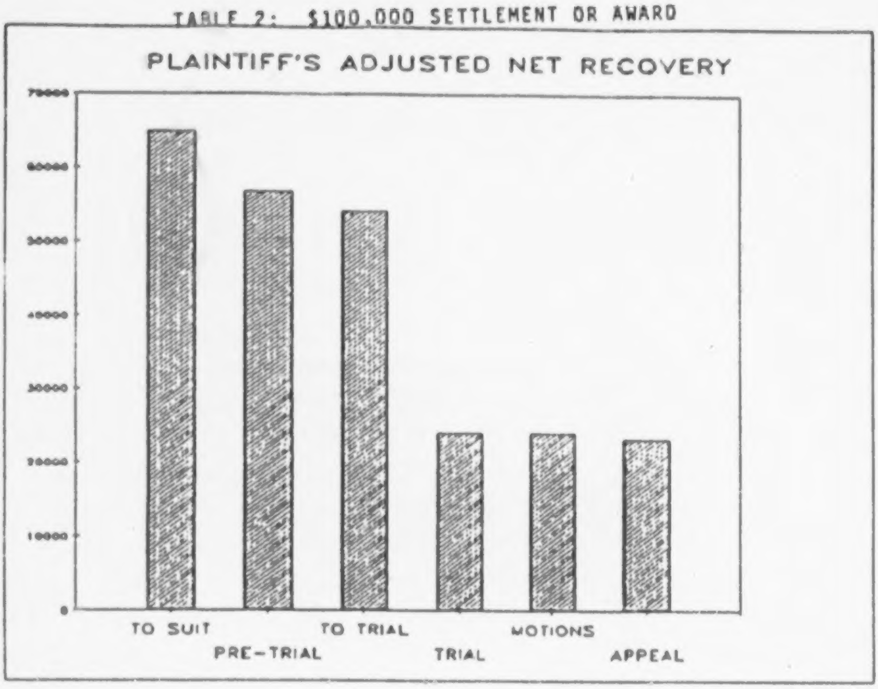
LAWYER						
Fee Percentage	@33%	33%	33%	40%	40%	40%
Fee Amount	$ 15,510	11,550	10,230	4,788	4,788	4,218
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 228	40	29	10	9	7
Overhead: Hour	$ -42	-42	-42	-42	-42	-42
LAWYER HOURLY NET	$ 186	(2)	(13)	(32)	(33)	(35)
PLAINTIFF NET RECOVERY	$ 31,490	23,450	20,770	7,182	7,182	6,327

RECOVERY: PRIOR TO SUIT

$31,490	Plaintiff share	$15,510	Lawyer fee
+15,859	6% interest compounded annually for 7 years	+ 7,811	6% interest compounded annually for 7 years
$47,349	NET YIELD TO PLAINTIFF had he accepted $50,000 offer prior to suit	$23,321	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata A

TABLE 2: $100,000 SETTLEMENT OR AWARD



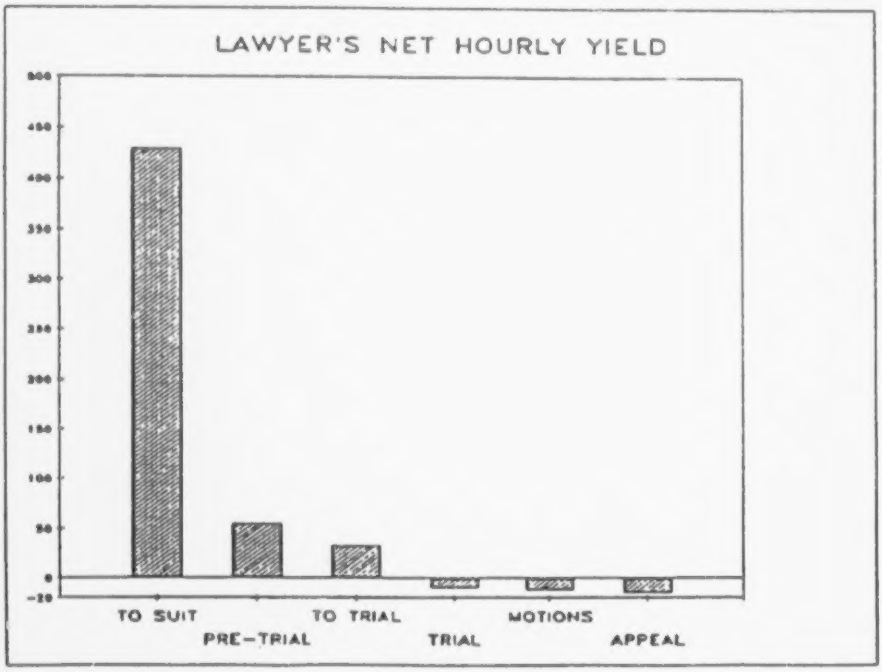


TABLE 2 $100,000

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$100,000	100,000	100,000	100,000	100,000	100,000
OUT-OF-POCKET	$ -3,000	-15,000	19,000	-29,000	-29,000	-31,500
Net	$ 97,000	85,000	81,000	71,000	71,000	68,500
* Less 43%	$ 0	0	0	-30,530	-30,530	-29,455
ADJUSTED NET	$ 97,000	85,000	81,000	40,470	40,470	39,045

* Adjustment for actuarial probability of defense verdict

LAWYER						
Fee Percentage	@33%	33%	33%	40%	40%	40%
Fee Amount	$ 32,010	28,050	26,730	16,188	16,188	15,618
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 471	97	75	32	30	27
Overhead: Hour	$ -42	-42	-42	-42	-42	-42
LAWYER HOURLY NET	$ 429	55	33	(10)	(12)	(15)
PLAINTIFF NET RECOVERY	$ 64,990	56,950	54,270	24,282	24,282	23,427

RECOVERY PRIOR TO SUIT

$64,990	Plaintiff share	$32,010	Lawyer fee
+32,731	6% interest compounded annually for 7 years	+16,121	6% interest compounded annually for 7 years
$97,721	NET YIELD TO PLAINTIFF had he accepted $100,000 offer prior to suit	$48,131	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata B

TABLE 3: $200,000 SETTLEMENT OR AWARD

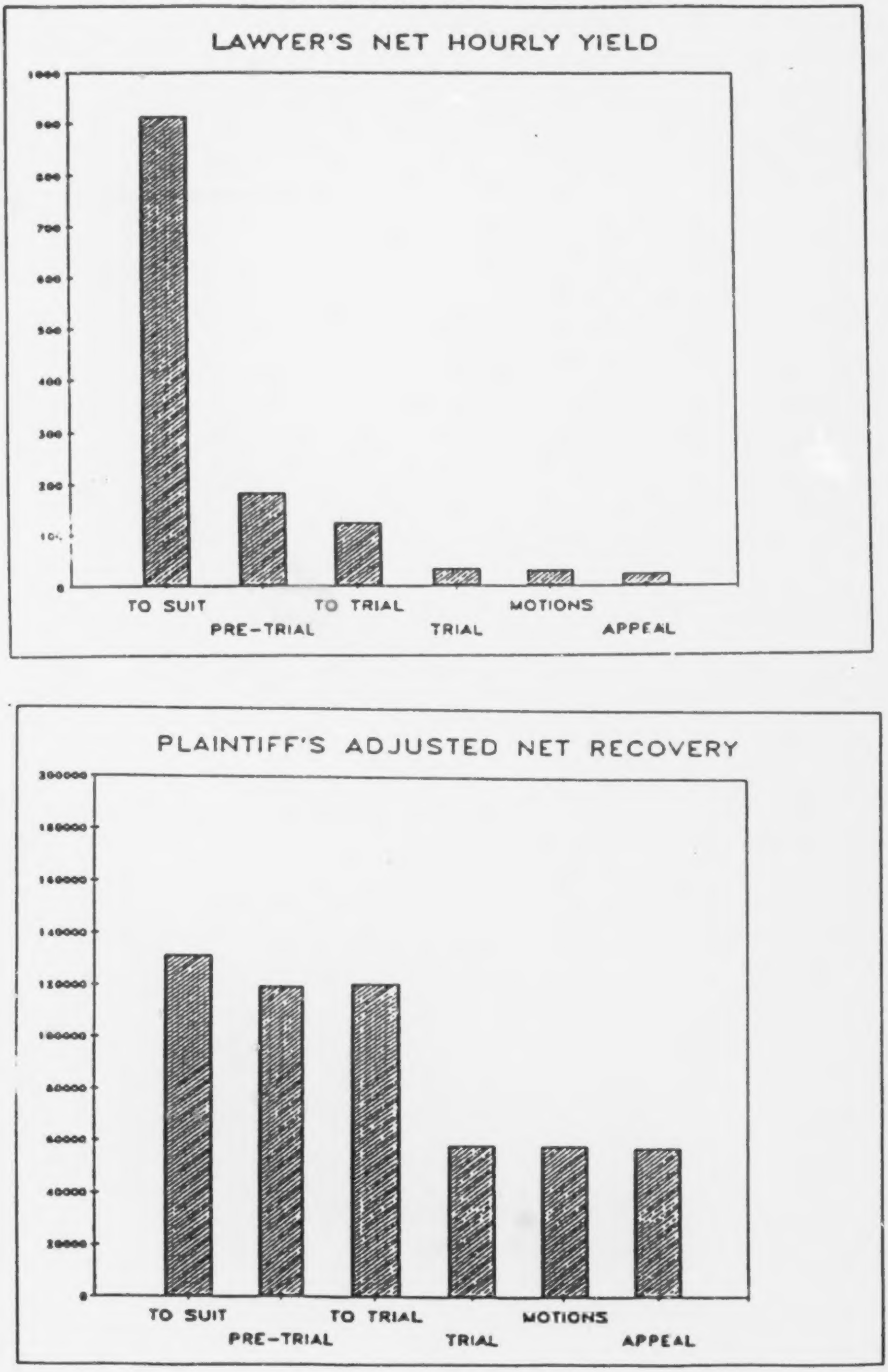


TABLE 3 $200,000

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$200,000	200,000	200,000	200,000	200,000	200,000
OUT-OF-POCKET	$ -3,000	-15,000	-19,000	-29,000	-29,000	-31,500
Net	$197,000	185,000	181,000	171,000	171,000	168,500
* Less 43%	$ 0	0	0	-73,530	-73,530	-72,455
ADJUSTED NET	$197,000	185,000	181,000	97,470	97,470	96,045

* Adjustment for actuarial probability of defense verdict

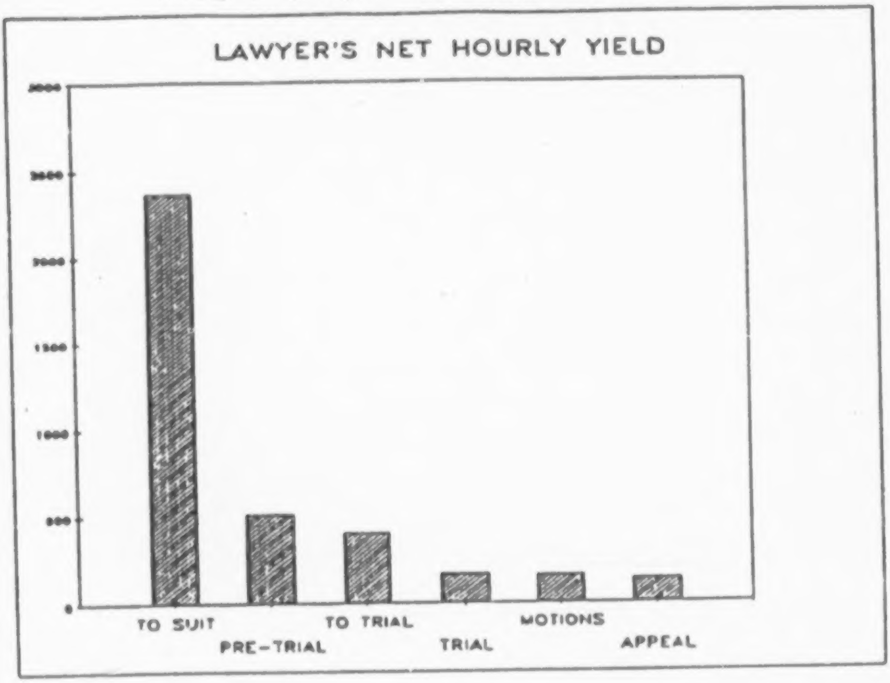
LAWYER						
Fee Percentage	@33%	33%	33%	40%	40%	40%
Fee Amount	$ 65,010	61,050	59,730	38,988	38,988	38,418
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 956	226	167	77	74	66
Overhead: Hour	$ -42	-42	-42	-42	-42	-42
LAWYER HOURLY NET	$ 914	184	125	35	32	24
PLAINTIFF NET RECOVERY	$ 131,990	123,950	121,270	58,482	58,482	57,627

RECOVERY PRIOR TO SUIT

$131,990	Plaintiff share	$65,010	Lawyer fee
+66,474	6% interest compounded annually for 7 years	+32,741	6% interest compounded annually for 7 years
$198,464	NET YIELD TO PLAINTIFF had he accepted $200,000 offer prior to suit	$97,751	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata C

TABLE 4: $500,000 SETTLEMENT OR AWARD



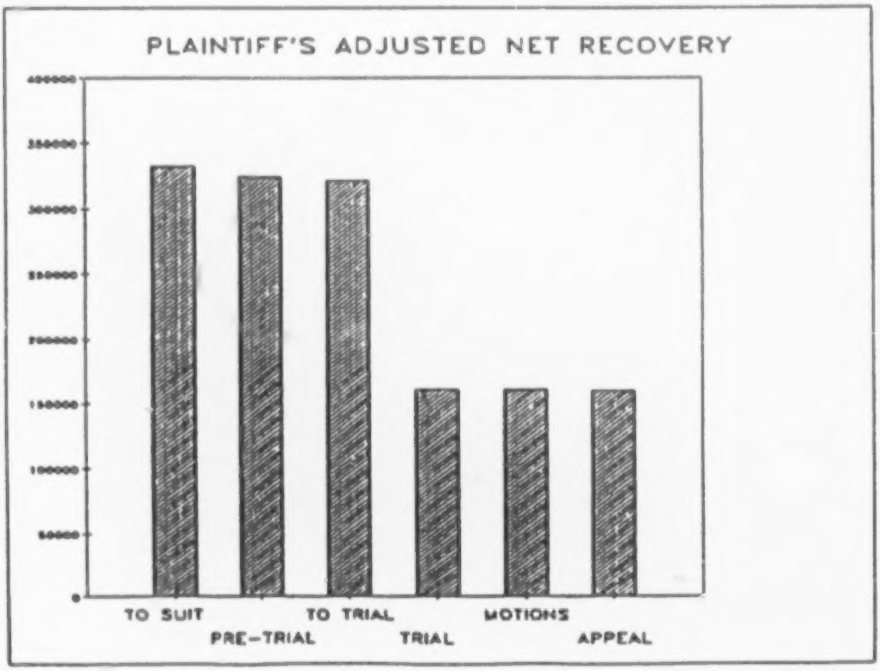


TABLE 4 $500,000

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$500,000	500,000	500,000	500,000	500,000	500,000
OUT-OF-POCKET	$ -3,000	-15,000	-19,000	-29,000	-29,000	-31,500
Net	$497,000	485,000	481,000	471,000	471,000	468,500
* Less 43%	$ 0	0	0	-202,530	-202,530	-201,455
ADJUSTED NET	$497,000	485,000	481,000	268,470	268,470	267,045

* Adjustment for actuarial probability of defense verdict

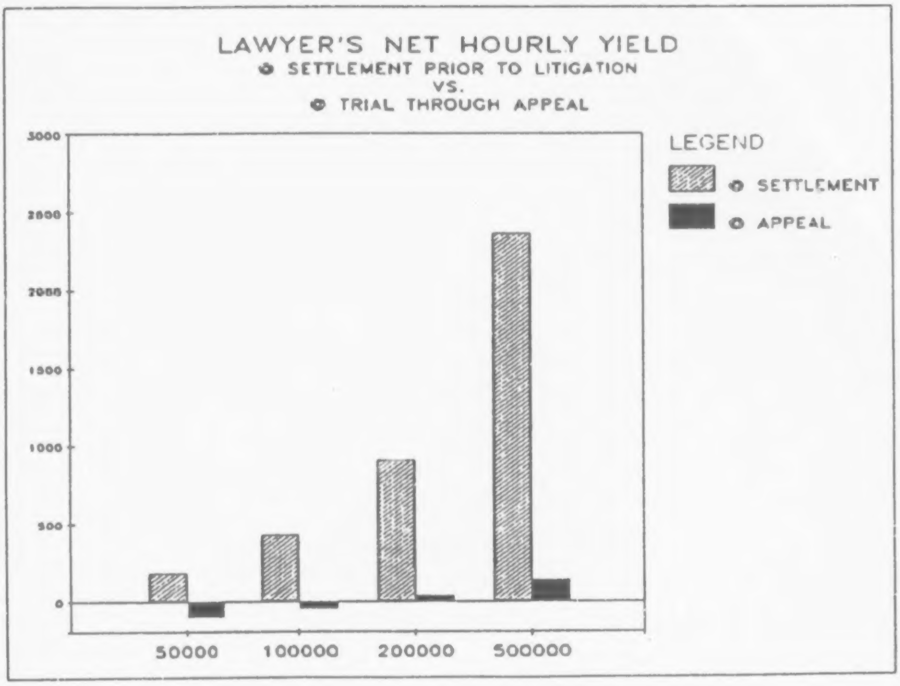
LAWYER						
Fee Percentage	33%	33%	33%	40%	40%	40%
Fee Amount	$164,010	160,050	158,730	107,388	107,388	106,818
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 2,412	556	445	212	203	184
Overhead: Hour	$ -42	-42	-42	- 42	- 42	- 42
LAWYER HOURLY NET	$ 2,370	514	403	170	161	142
PLAINTIFF						
NET RECOVERY	$332,900	324,950	322,270	161,082	161,082	160,227

RECOVERY PRIOR TO SUIT

$332,990	Plaintiff share	$164,010	Lawyer fee
+167,705	6% interest compounded annually for 7 years	+ 82,601	6% interest compounded annually for 7 years
$500,695	NET YIELD TO PLAINTIFF had he accepted $500,000 offer prior to suit	$246,611	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata D

TABLE: PRO RATA E



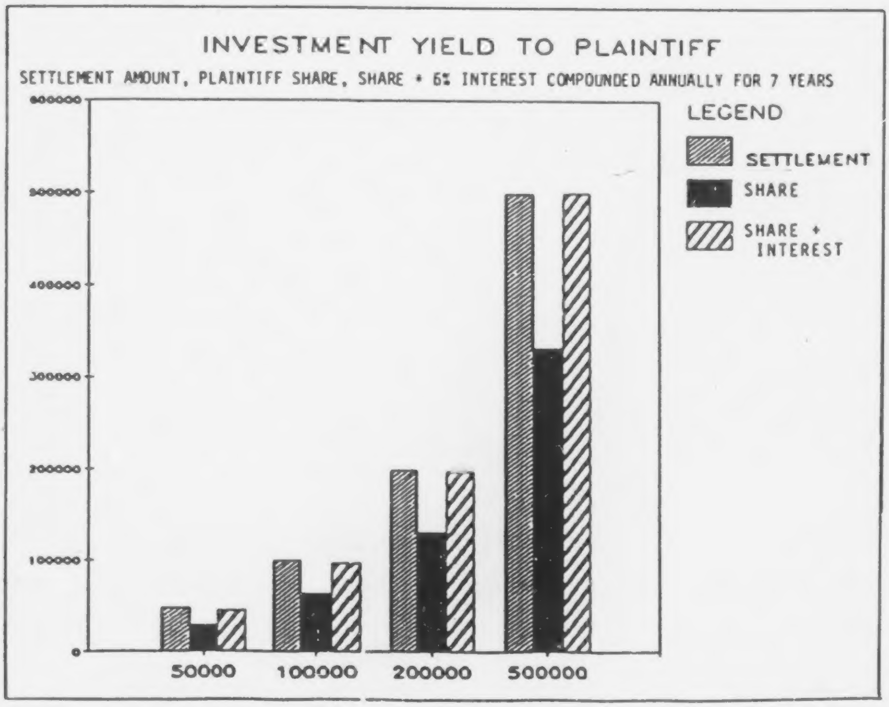
SETTLEMENT VERSUS TRIAL: EFFECT ON ATTORNEY'S ANNUALIZED INCOME

We will assume that the lawyer was able to work as many as 1,400 hours a year handling income productive client cases. This is a conservative assumption, as substantial time is lost on cases that the lawyer or the court reject for lack of merit prior to verdict. Time lost may extend from interview of the injured party through the process of appeal.

In addition, we did not take into consideration other non-income productive time used in the hiring and training of associates, in the running and developing of the practice, in professional and civic activities, and in keeping abreast with legal developments.

		MINIMUM HOURS	x	NET HOURLY YIELD	=	ANNUALIZED
$ 50,000	Settlement	1,400	x	$ 186	=	$ 260,400
	Award at Appeal	1,400	x	(32)	=	(44,800)
$100,000	Settlement	1,400	x	429	=	600,600
	Award at Appeal	1,400	x	(16)	=	(22,400)
$200,000	Settlement	1,400	x	914	=	1,279,600
	Award at Appeal	1,400	x	40	=	56,000
$500,000	Settlement	1,400	x	2,370	=	3,318,000
	Award at Appeal	1,400	x	142	=	198,800

Pro Rata E


INVESTMENT YIELD TO PLAINTIFF
SETTLEMENT AMOUNT, PLAINTIFF SHARE, SHARE + 6% INTEREST COMPOUNDED ANNUALLY FOR 7 YEARS
600000
500000
400000
300000
200000
100000
0
50000
100000
200000
500000
LEGEND
SETTLEMENT
SHARE
SHARE + INTEREST

YIELD TO PLAINTIFF ON NET EARLY SETTLEMENT INVESTED AT 6%

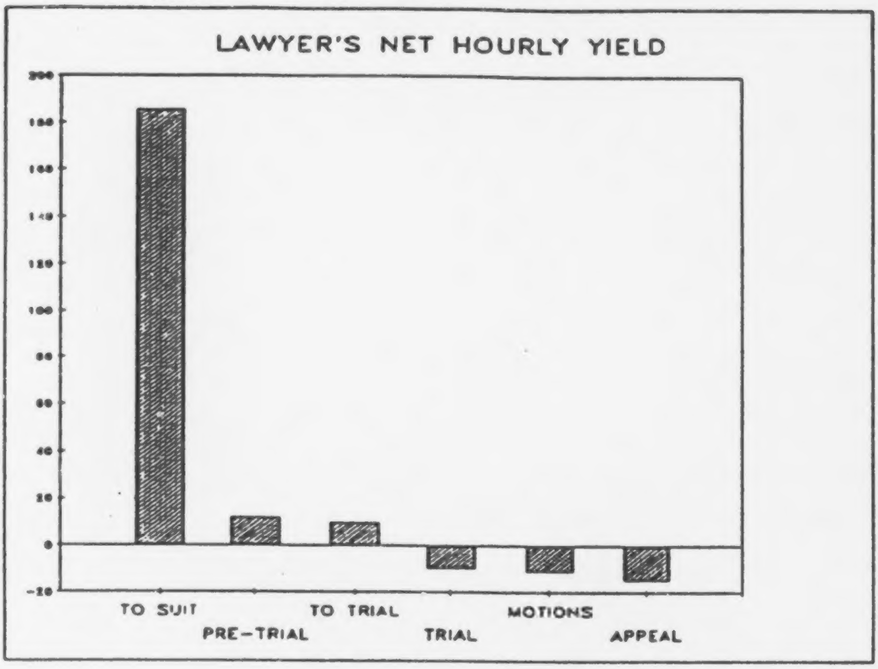
SETTLEMENT	$ 50,000	100,000	200,000	500,000
OUT-OF-POCKET	$- 3,000	- 3,000	- 3,000	- 3,000
LAWYER FEE	$-15,510	-32,010	-65,010	-164,010
PLAINTIFF: NET RECOVERY	$ 31,490	64,990	131,990	332,990
INTEREST: YEAR 1	$ 1,889	3,899	7,919	19,979
YEAR 3	$ 6,015	12,414	25,212	63,606
YEAR 5	$ 10,650	21,980	44,642	112,626
YEAR 7	$ 15,859	32,731	66,474	167,705
PLAINTIFF TOTAL YIELD including 6% interest compounded annually for 7 years	$ 47,349	97,721	198,464	500,695

Pro Rata F

You will notice that the plaintiff's net settlement or award decreases throughout the different phases of litigation. The plaintiff loses additional time from work, which may be deducted from his wages. He also loses the interest that could have been earned from an early settlement, not to mention experiencing anxiety over the outcome. Obviously, the plaintiff and his attorney are best served by settling such claims as early as possible and without litigation.

Another example which is typical is one where the insurance company offers $100,000 prior to litigation, when the probable verdict is $200,000 and the expectation of plaintiff recovery is 57% (the actuarial verdict value is $200,000 x 57% = 200,000 - 57,000 = $114,000). The insurance company increases the offer at each stage prior to trial, and the verdict is even higher. This "increasing offer" situation is explored in the following tables.

TABLE 5: $50,000 INITIAL OFFER, INCREASED



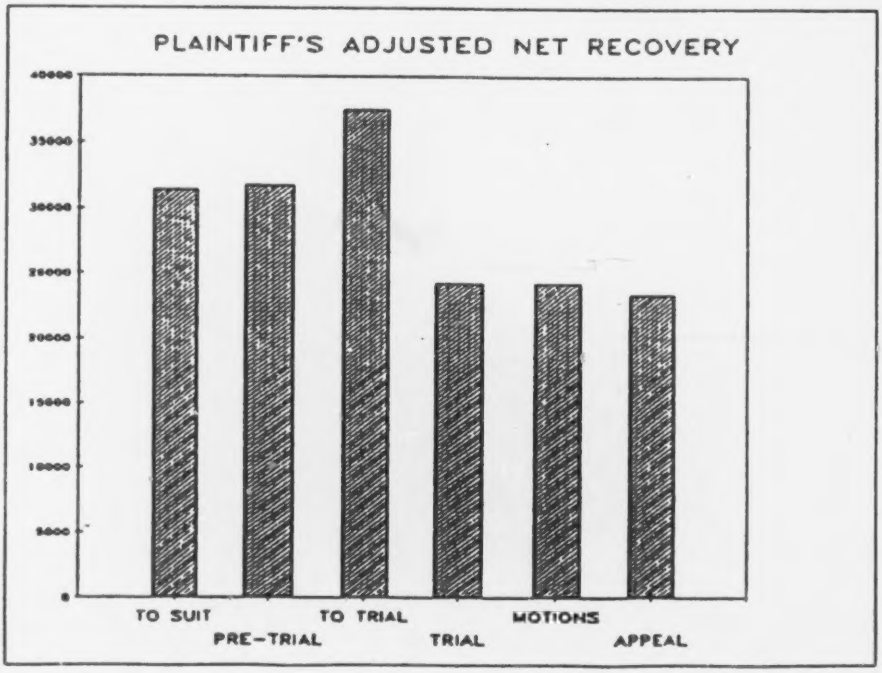


TABLE 5 $50,000 Initial Offer Increased At Stages
Actuarial Verdict Value = $57,000

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$ 50,000	62,500	75,000	100,000	100,000	100,000
OUT-OF-POCKET	$ -3,000	-15,000	-19,000	-29,000	-29,000	-31,500
Net	$ 47,000	47,500	56,000	71,000	71,000	68,500
* Less 43%	$ 0	0	0	-30,530	-30,530	-30,530
ADJUSTED NET	$ 47,000	47,500	56,000	40,470	40,470	39,045

* Adjustment for actuarial probability of defense verdict

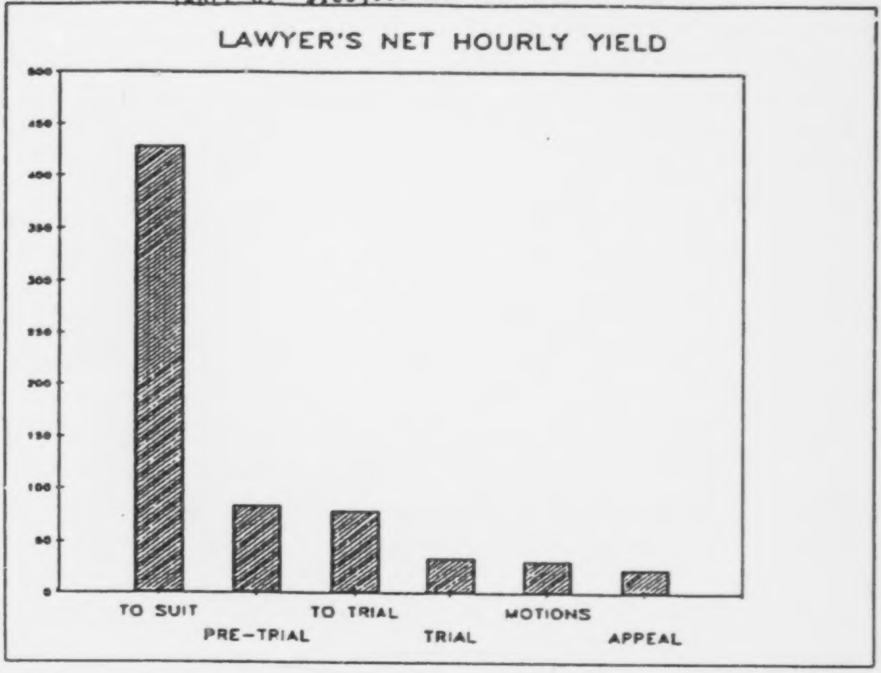
LAWYER						
Fee Percentage	33%	33%	33%	40%	40%	40%
Fee Amount	$ 15,510	15,675	18,480	16,188	16,188	15,618
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 228	54	52	32	31	27
Overhead: Hour	$ -42	-42	-42	-42	-42	-42
LAWYER HOURLY NET	$ 186	12	10	(10)	(11)	(15)
PLAINTIFF NET RECOVERY	$ 31,490	31,825	37,520	24,282	24,282	23,427

RECOVERY PRIOR TO SUIT

$31,490	Plaintiff share	$15,510	Lawyer fee
+15,859	6% interest compounded annually for 7 years	+ 7,811	6% interest compounded annually for 7 years
$47,349	NET YIELD TO PLAINTIFF had he accepted $50,000 offer prior to suit	$23,321	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata G

TABLE 6: $100,000 INITIAL OFFER, INCREASED



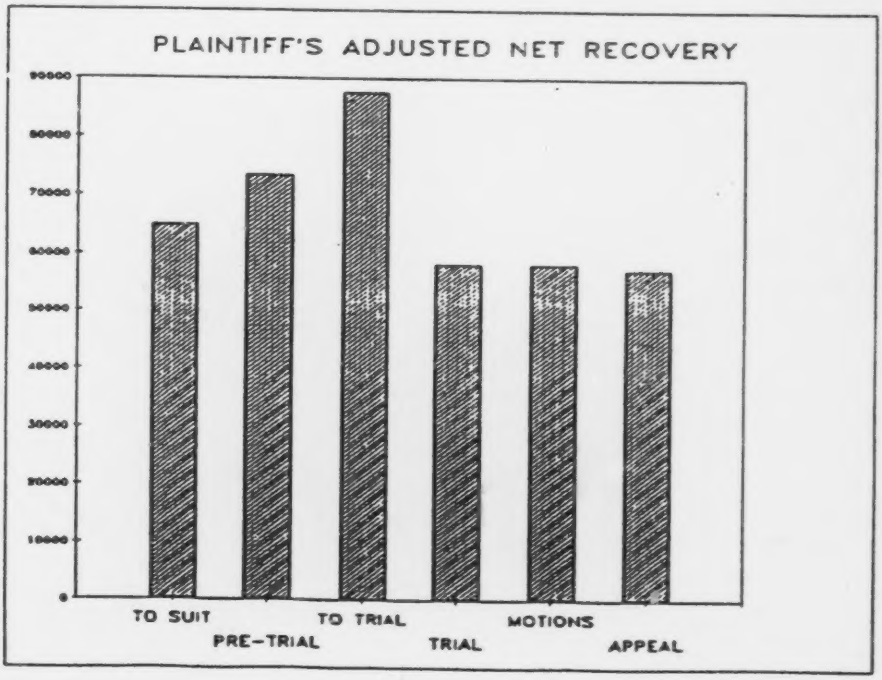


TABLE 6 $100,000 Initial Offer Increased At Stages
Actuarial Verdict Value = $114,000

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$100,000	125,000	150,000	200,000	200,000	200,000
OUT-OF-POCKET	$ -3,000	-15,000	-19,000	-29,000	-29,000	-31,500
Net	$ 97,000	110,000	131,000	171,000	171,000	168,500
* Less 43%	$ 0	0	0	-73,530	-73,530	-72,455
ADJUSTED NET	$ 97,000	110,000	131,000	97,470	97,470	96,045

* Adjustment for actuarial probability of defense verdict

LAWYER						
Fee Percentage	33%	33%	33%	40%	40%	40%
Fee Amount	$ 32,010	36,300	43,230	38,988	38,988	38,418
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 471	126	121	77	74	66
Overhead: Hour	$ -42	-42	-42	-42	-42	-42
LAWYER HOURLY NET	$ 429	84	79	35	32	24
PLAINTIFF NET RECOVERY	$ 64,990	73,700	87,770	58,482	58,482	57,627

RECOVERY PRIOR TO SUIT

$64,990	Plaintiff share	$32,010	Lawyer fee
+32,731	6% interest compounded annually for 7 years	+16,121	6% interest compounded annually for 7 years
$97,721	NET YIELD TO PLAINTIFF had he accepted $100,000 offer prior to suit	$48,131	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata H

TABLE 7: $200,000 INITIAL OFFER, INCREASED

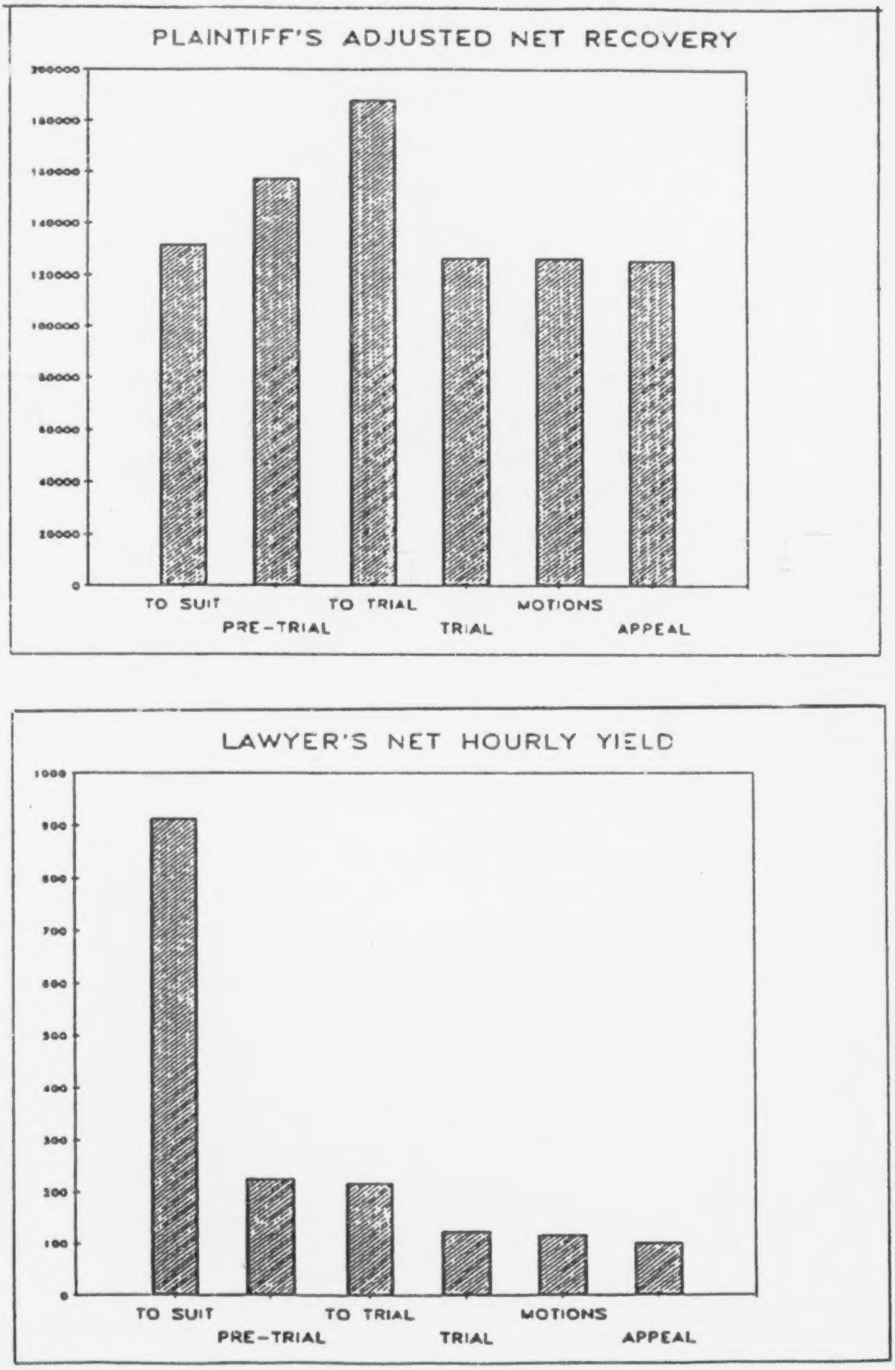


TABLE 7 $200,000 Initial Offer Increased At Stages
Actuarial Verdict Value = $228,000

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$200,000	250,000	300,000	400,000	400,000	400,000
OUT-OF-POCKET	$ -3,000	-15,000	-19,000	-29,000	-29,000	-31,500
Net	$197,000	235,000	281,000	371,000	371,000	368,500
* Less 43%	$ 0	0	0	-159,530	-159,530	-158,455
ADJUSTED NET	$197,000	235,000	281,000	211,470	211,470	210,045

* Adjustment for actuarial probability of defense verdict

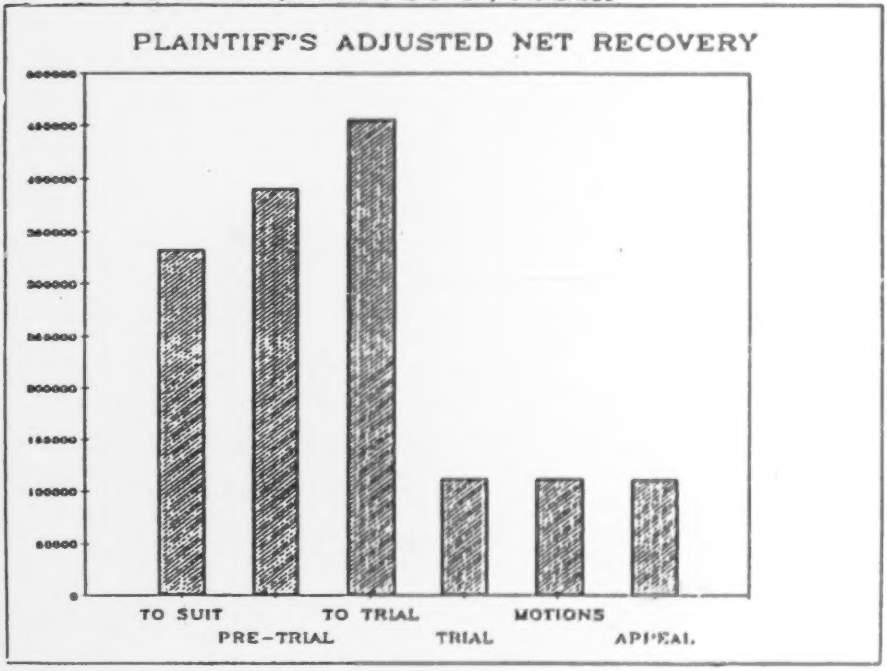
LAWYER						
Fee Percentage	33%	33%	33%	40%	40%	40%
Fee Amount	$ 65,010	77,550	92,730	84,588	84,588	84,018
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 956	269	260	167	160	144
Overhead: Hour	$ -42	-42	-42	-42	-42	-42
LAWYER HOURLY NET	$ 914	227	218	125	118	102
PLAINTIFF NET RECOVERY	$131,990	157,450	188,270	126,882	126,882	126,027

RECOVERY PRIOR TO SUIT

$131,990	Plaintiff share	$65,010	Lawyer fee
+ 66,474	6% interest compounded annually for 7 years	+32,741	6% interest compounded annually for 7 years
$198,464	NET YIELD TO PLAINTIFF had he accepted $200,000 offer prior to suit	$97,751	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata I

TABLE 8: $500,000 INITIAL OFFER, INCREASED



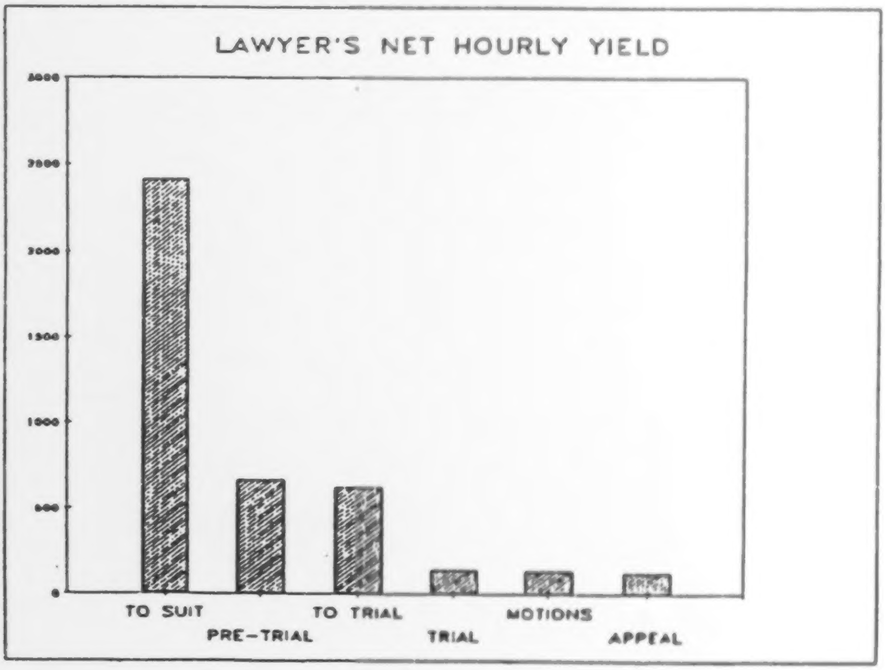


TABLE 8 $500,000 Initial Offer Increased At Stages
Actuarial Verdict Value = $484,500

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
GROSS	$500,000	600,000	700,000	850,000	850,000	850,000
OUT-OF-POCKET	-3,000	-15,000	-19,000	-29,000	-29,000	-31,500
Net	$497,000	585,000	681,000	821,000	821,000	818,500
* Less 43%	$ 0	0	0	-353,030	-353,030	-351,955
ADJUSTED NET	$497,000	585,000	681,000	467,970	467,970	466,545

* Adjustment for actuarial probability of defense verdict

	TO SUIT	PRE-TRIAL	TO TRIAL	TRIAL	MOTIONS	APPEAL
LAWYER						
Fee Percentage	33%	33%	33%	40%	40%	40%
Fee Amount	$164,010	193,050	224,730	187,188	187,188	186,618
Hours, Minimum	68	288	357	507	529	581
Yield Per Hour	$ 2,412	670	629	369	354	321
Overhead: Hour	$ -42	-42	-42	- 42	- 42	- 42
LAWYER HOURLY NET	$ 2,370	628	587	327	311	279
PLAINTIFF NET RECOVERY	$332,990	391,950	456,270	280,782	280,782	279,927

RECOVERY PRIOR TO SUIT

$332,990	Plaintiff recovery	$164,010	Lawyer fee
+167,705	6% interest compounded annually for 7 years	+ 82,601	6% interest compounded annually for 7years
$500,695	NET YIELD TO PLAINTIFF had he accepted $500,000 offer prior to suit	$246,611	NET YIELD TO LAWYER if case were settled prior to suit

Pro Rata J

Table 5 is premised on the assumption that the insurance company makes an offer of $50,000 prior to suit and increases the offer (not an unusual occurrence) at the pre-trial to $62,500. You will note that the attorney's net hourly recovery rate decreases from $186 to $12.

Now let us assume that the offer in the trial room is increased to $75,000. You will note that the attorney's hourly yield decreases to $10 per hour.

Assuming that the case is tried, the verdict can be either for the plaintiff in the sum of $100,000 or, in 43% of the cases, for the defendant (57% plaintiff recovery rate). The actuarial verdict value, as assumed, is $57,000 ($100,000 x 57% = $57,000). On an actuarial basis, the attorney's fee decreases to a loss of $10 per hour.

As outlined in Table 6, if the offer is $100,000, increased to $125,00 at the pre-trial, then the attorney's net hourly yield decreases from $429 to $84. If the trial room offer is $150,000, the net hourly yield decreases to $79; and if the case is tried to a verdict for plaintiff, then the actuarial net hourly yield is $35 .

Table 7 illustrates that if an initial offer of $200,000 is increased to $250,000 at the pre-trial, the attorney's net hourly yield decreases from $914 to $227. Likewise, a trial room offer of $300,000 reflects a net hourly yield of $218, and a $400,000 verdict for plaintiff results in a further reduction of the attorney's net hourly yield to $125 per hour, calculated on an actuarial basis.

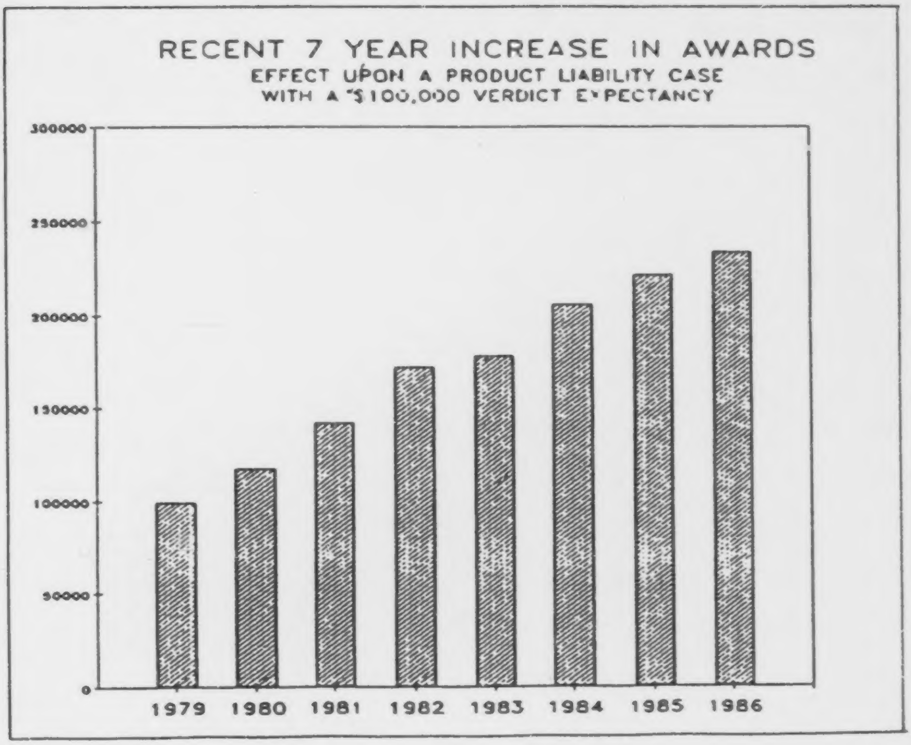
As a final example explained in Table 8, an offer of $500,000 that is increased to $600,000 at the pre-trial, results in a decrease in the net hourly yield to the attorney from $2,370 to $628. A trial room offer of $700,000 yields a net of $587 per hour, and an $850,000 plaintiff verdict reduces the actuarial net yield to $327 per attorney hour.

Verdicts in the sum of $100,000 or more, or defense verdicts, are likely candidates for motions for a new trial or for appeal. Assuming that the plaintiffs are successful, the court may reduce the verdict, may find for the defense as a matter of law or weight of evidence, or may order a new trial. If the finding is for the defendant, the plaintiff's lawyer, of course, loses his fee and, in all probability, will have to absorb the out-of-pocket expenses. If a new trial is granted, the plaintiff's attorney must begin the process again, having lost not only the previous time expended but considerable out-of-pocket expenses as well.

Although the insurance company will usually ask for the defense firm's evaluation, defense counsel face the same valuation problems as the insurance company. To be on the safe side, especially if the case gets tried, and to avoid the possible embarrassment of a verdict well in excess of their valuation, the defense firm's partially educated guess may well be on the high side and may or may not be so recognized by the insurer's lawsuit supervisor.

Even though there may be sufficient information to evaluate and settle the case, in most product liability suits there will be numerous gaps in information as to liability, injury, and out-of-pocket expenses. Numerous depositions will often be recommended. Likewise, expert witnesses will be consulted. While the use of these depositions and consultations increases the insurance company's legal fees and out-of-pocket expenses, they frequently have only a minimal effect on the settlement value of the case. However, these depositions and consultations are often essential for trial.

TABLE: VERDICT A



RECENT 7 YEAR INCREASE IN AWARDS
EFFECT UPON A PRODUCT LIABILITY CASE
WITH A $100,000 VERDICT EXPECTANCY

RECENT INCREASE IN VERDICT AWARDS

Increase in value of sample-size awards over the most recent seven year period, reflecting the average annual increase in awards in product liability cases.

TABLE 1 AVERAGE INCREASE OVER 7 YEAR PERIOD

Year	Increase	Probable Award Amount		
1978	6.15%	10,000	100,000	1,000,000
1979	17.71%	11,771	117,710	1,177,100
1980	24.54%	14,225	142,250	1,422,500
1981	30.49%	17,274	172,740	1,727,400
1982	5.85%	17,859	178,590	1,785,900
1983	27.54%	20,613	206,130	2,061,300
1984	15.36%	22,149	221,490	2,214,900
1985	12.24%	23,373	233,730	2,337,300

TABLE 2 INCREASE OVER 5 YEAR PERIOD.

Year	Increase	Probable Award Amount		
1980	24.54%	10,000	100,000	1,000,000
1981	30.49%	13,049	130,490	1,304,900
1982	5.85%	13,634	136,340	1,363,400
1983	27.54%	16,388	163,880	1,638,800
1984	15.36%	17,924	179,240	1,792,400
1985	12.24%	19,148	191,480	1,914,800

TABLE 3 INCREASE OVER 3 YEAR PERIOD.

Year	Increase	Probable Award Amount		
1982	5.85%	10,000	100,000	1,000,000
1983	27.54%	12,754	127,540	1,275,400
1984	15.36%	14,290	142,900	1,429,000
1985	12.24%	15,514	155,140	1,551,409

Verdict A

There is also considerable evidence that some insurance companies do not give adequate consideration to the substantial yearly increase in cost caused by the steady inflation in the size of awards. The enclosed chart shows what happened with three verdict probability amounts over the most recent three, five, and seven year period. Cases pending for seven years or more are not unusual in product liability.

Realizing that defense and supervision costs can become formidable and that awards increase each year, many insurance companies understandably will do anything within reason to arrive at a settlement without litigation. Unfortunately, as previously noted, the product liability claim and related injuries may be unique to the evaluators. They may have no real idea of what verdict they can expect from a jury.

Some companies rely solely on their past claims experience, which may not be completely relevant. Such companies may recognize that their partially educated guess is questionable. As a result, their settlement offers will often depend largely on the firmness of the plaintiff attorney's demands and will be influenced by publicized accounts of large verdicts. Such companies may, with frequency, authorize settlement amounts that are many times the verdict actuarial value. In fact, they may offer amounts that are far larger than the probable verdict amount without considering the fact that jurors find for the defense in a large percentage of cases.

Even though such companies' offers may be for amounts larger than jurors can be expected to award, many such cases still go into litigation. The reason the offer may be rejected is because such companies are unable to demonstrate to the plaintiff's lawyer that he cannot expect to do better in the court room. To arrive at a settlement amount, some insurance companies and plaintiff's lawyers continue to depend largely on the litigation and negotiation process.

Other insurance companies augment their past claims experience with the information now available from a comprehensive, national data bank of product liability verdicts and verdict expectancy tables provided by Jury Verdict Research, Inc.

Experience in court before jurors has proven the validity of this actuarial verdict information. Insurance companies that use these actuarial valuations and Jury Verdict Research Inc.'s individualized case evaluations generally arrive at earlier, more reasonable settlements. They are not only confident of the validity of their evaluations, but they are also able to demonstrate, with evidence, the soundness of their offers.

It is obvious from the cost accounting provided herein, that, unless settlements are arrived at early and without litigation, or with a minimum of litigation, the plaintiff, his lawyer, and the insurance company all lose. Clearly, early settlements benefit everyone.

As more insurance companies and attorneys realize that litigation affects them adversely and that they can arrive at earlier settlements by using actuarial verdict information, a more efficient and just system for the settlement of personal injury claims will evolve. The result of this realization will be an earlier and larger net recovery for the injured party, a much larger net hourly yield for the plaintiff's counsel, and substantial savings to the insurance company.

The demise of unnecessary litigation should go a long way toward taking the crisis out of product liability claims.

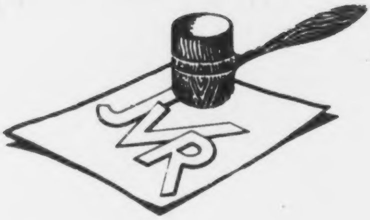
PHILIP J. HERMANN
Chairman of the Board
Jury Verdict Research, Inc.

REPORT TO THE SUBCOMMITTEE ON ECONOMIC STABILIZATION
# of the
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

TESTIMONY ON THE LIABILITY CRISIS FOCUSING ON THE FACTS OF THE INSURANCE CRISIS

AUGUST 6, 1986
PHILIP J. HERMANN
CHAIRMAN OF THE BOARD

JURY VERDICT RESEARCH, INC.



JURY VERDICT RESEARCH, INC.
5325-B NAIMAN PKWY
SOLON, OHIO 44139-1065

TOLL FREE (800) 321-6910, IN OHIO (216) 248-7960 COLLECT

John J. LaFalce, Chairman
United States House of Representatives
Subcommittee on Economic Stabilization of the
Committee on Banking, Finance and Urban Affairs

Dear Representative LaFalce:

Thank you for inviting me to testify about the liability insurance crisis, focusing on the facts of the "litigation crisis." You request, **"Your testimony should cover many of the points made in your discussion with my staff."** As founder and Chairman of the Board of Jury Verdict Research, Inc., I shall respond to your request, using information collected and analyzed over the past 26 years.

Your letter stated, **"The Subcommittee is also interested in your views as to whether your figures regarding the average jury verdict can in any way be equated with the amounts actually paid out in claims by insurers."**

To this question I shall respond, not only with the insight gained in Jury Verdict Research, but also from my many years as a chairman and vice chairman of the Product Liability Subcommittee of the Product Professional and General Liability Committee of the former Insurance, Negligence, and Compensation Law Section of the American Bar Association, and also as an active, personal injury jury trial lawyer for the past 40 years, who has interviewed most of the juries before whom I have appeared. I have, in the main, defended suits on behalf of both large and small insurance carriers, self insurers, as well as representing, to a lesser extent, injured people.

You state, "**In particular, I am interested in clarifying exactly what Jury Verdict Research does or does not do in order to assess whether a statistically sound basis exists for concluding that the average size of jury verdicts has recently skyrocketed, thereby causing liability insurers to incur great losses and justify calls for tort reform.**"

Jury Verdict Research is an impartial research organization that has, for over 26 years, furnished verdict information nationally and internationally to personal injury lawyers representing plaintiff as well as defendant, insurance companies, trade associations, corporations, federal, local, state, and some foreign governments, and libraries. It collects, checks and analyzes verdicts from all fifty states, and maintains the only comprehensive national verdict data bank. Our research department is aided by the latest computer technology.

JVR has neither asserted nor published any conclusions that the average size of jury verdicts has recently skyrocketed. Although verdicts, as well as many other items, have increased substantially over the years, our studies do not support any claim of recently escalating jury verdict awards.

The apparent reason for this erroneous impression is that a number of highly publicized news articles quoting our statistics have grossly misstated them. Particularly misleading is the widely-quoted article that appeared in "Time" Magazine, March 24, 1986, entitled, "Sorry, Your Policy is Cancelled." Although the authors had available our complete statistics on Current Award Trends, published in January, 1986, they obviously decided to make a good story even more interesting by ignoring information indicating verdicts may have largely stabilized and publishing only the average verdict figures that are very high and, admittedly, distorted by a small number of unusually large verdicts. The authors conveniently overlooked the midpoint verdicts, which are a far more meaningful and valid indication of award trends. The article also failed to report that, analyzing representative injuries over the past 10 years, verdicts have increased at an average rate of 15.23% per year. The largest increase was 30.49% in 1981; 15.36% in 1984; and 12.24% for 1985, an incomplete figure.

THE VERDICT COLLECTION PROCESS

You wish to know the kind of information used by JVR and how it is collected. We collect verdicts rendered throughout the 50 states and District of Columbia by juries hearing personal injury cases. We are assisted by Clerks of Courts, court reporters, newspaper reporters, attorneys, law students, newspaper clipping services, and by local reporting services. To secure the best possible coverage, some of these sources duplicate others. A full-time staff member, using mail and WATS line, contacts our sources to secure a steady flow and the best possible coverage.

The information is verified with the trial attorneys representing the plaintiff and defendant or defendants. The information furnished by mail may not be complete enough. When necessary, another staff research member makes telephone contact with the attorneys and other parties in order to obtain as complete and accurate reporting as is possible. Although we receive excellent cooperation from the clerks of courts and from other sources, busy attorneys do, in a minority of cases, fail to furnish sufficiently meaningful information for that data to be included in our research and reported to our subscribers. Although we admittedly do not receive sufficient meaningful data for all verdicts, we believe that we do for most verdicts rendered nationally, and from many areas, all, or nearly all. We are confident that the data for the hundreds of cases that JVR receives and processes each week (about 2000 a month) constitutes more than a representative sampling and enables our staff to compile valid statistical verdict information. Although we also collect information on settlements and bench judgments, only those cases tried to a verdict by a jury are used for statistical purposes.

5

STATISTICAL METHODOLOGY

The statistical methodology was specifically designed for JVR by Dr. Hans Zeisel and Professor Gary Kalven (now deceased) of the University of Chicago School of Law. Dr. Zeisel and Professor Kalven made many comprehensive studies of jury verdicts. Dr. Zeisel is also an internationally respected statistician. His widely-used book, Say It With Figures (How To Make Figures Make Sense), currently in the sixth edition (1984), is published by Harper and Row.

After determining that we had suficient verdict data from which to construct valid tables, Drs. Zeisel and Kalven established those tables that JVR would publish and the statistical methodology for their construction. The result is a professional service for determining verdict probabilities, trends and analyses for those who are affected by personal injury verdicts.

Their methodology suggested that JVR identify five different statistical computations for each injury and for each grouping of specials within an injury category - classified by the amount of medical, hospital, out-of-pocket, and loss of earnings expenses. The purpose of the different computations is to give the user the means of making the best possible decision of the value of personal injury.

These computations are:

1. Verdict Expectancy	the probable amount that a jury would award for an injury
2. Midpoint Verdict	the central verdict on a list of ascending awards
3. Probability Range	the middle 50% of all verdicts on a list of ascending awards
4. Verdict Range	the lowest-to-highest verdicts on a list of ascending awards
5. Verdict Average	the arithmetical Mean of all the verdicts included in a table

Where unusually high or unusually low verdicts distort the research statistics, they may be excluded, but not disregarded. Any exclusions and the amounts of the excluded verdicts are furnished for the reader's information. In many situations JVR publishes statistics both with and without distorting verdict amounts, clearly labeling each.

For years Drs. Zeisel and Kalven received and, we understand, reviewed every research release published by Jury Verdict Research, Inc. The statistical methods established by Drs. Zeisel and Kalven continue to be used by our staff for statistical analysis and calculation.

7

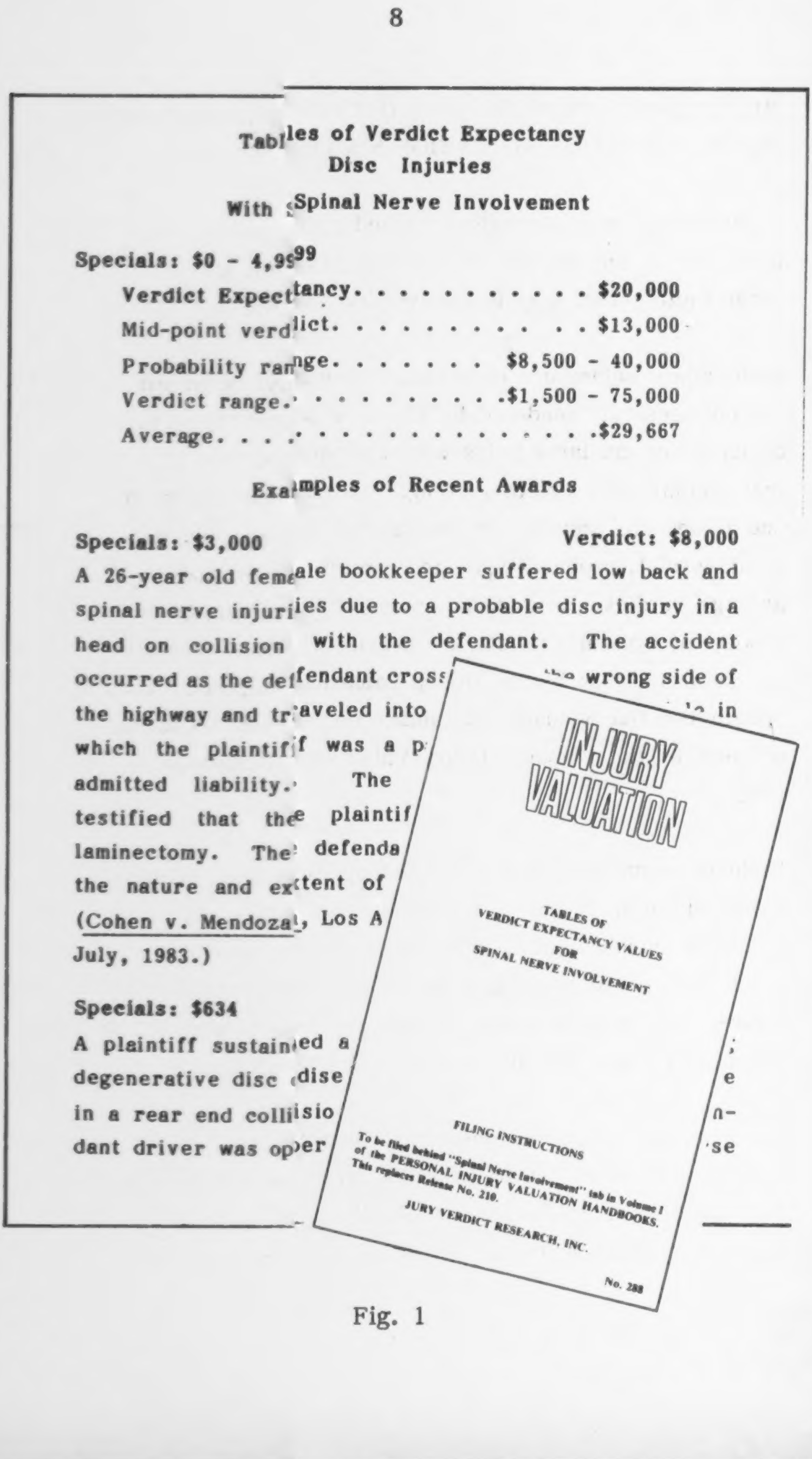
THE ANALYSIS PROCESS - PRODUCING THE PERSONAL INJURY VALUATION HANDBOOK SECTIONS

Utilizing accepted statistical methods, the verdict information is scrutinized for liability, injuries, and other factors that may influence jury awards.

Basic injury values are determined by analyzing awards for compensation rendered by juries to plaintiffs seeking damages for similar injuries with comparable medical specials and loss of earnings. These are tabulated and tables are prepared giving verdict expectancy, midpoint verdict, probability range, verdict range, and average verdict. In addition, research observations and reports of typical verdicts are provided. These reports are published monthly as **Injury Valuation Reports. They update the five volumes containing the "Injury Valuation" sections of the Personal Injury Valuation Handbooks** (Fig. 1).

Basic recovery rates are computed by examining verdicts rendered for plaintiffs and for defendants in cases involving similar liability situations; the statistical result is a percentage-based probability of a verdict award. **The collected reports make up two volumes of the Handbooks titled Liability Recovery Probabilities.**

Likewise, **psychological factors** are also analyzed to determine their effect on basic recovery and basic injury values. These include the effects of multiple defendants, age of plaintiff, witnesses, medical conflict,



8

Tables of Verdict Expectancy
Disc Injuries

With Spinal Nerve Involvement

Specials: $0 - 4,999

Verdict Expectancy. $20,000
Mid-point verdict. $13,000
Probability range. . . . . $8,500 - 40,000
Verdict range. . . . .$1,500 - 75,000
Average. $29,667

Examples of Recent Awards

Specials: $3,000 **Verdict: $8,000**

A 26-year old female bookkeeper suffered low back and spinal nerve injuries due to a probable disc injury in a head on collision with the defendant. The accident occurred as the defendant cross

the wrong side of the highway and traveled into

in which the plaintiff was a p

admitted liability. The

testified that the plaintif

laminectomy. The defenda

the nature and extent of

(Cohen v. Mendoza, Los A

July, 1983.)

Specials: $634

A plaintiff sustained a

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degenerative disc disease

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INJURY VALUATION

TABLES OF
VERDICT EXPECTANCY VALUES
FOR
SPINAL NERVE INVOLVEMENT

FILING INSTRUCTIONS
To be filed behind "Spinal Nerve Involvement" tab in Volume I of the PERSONAL INJURY VALUATION HANDBOOKS. This replaces Release No. 210.

JURY VERDICT RESEARCH, INC.

No. 288

Fig. 1

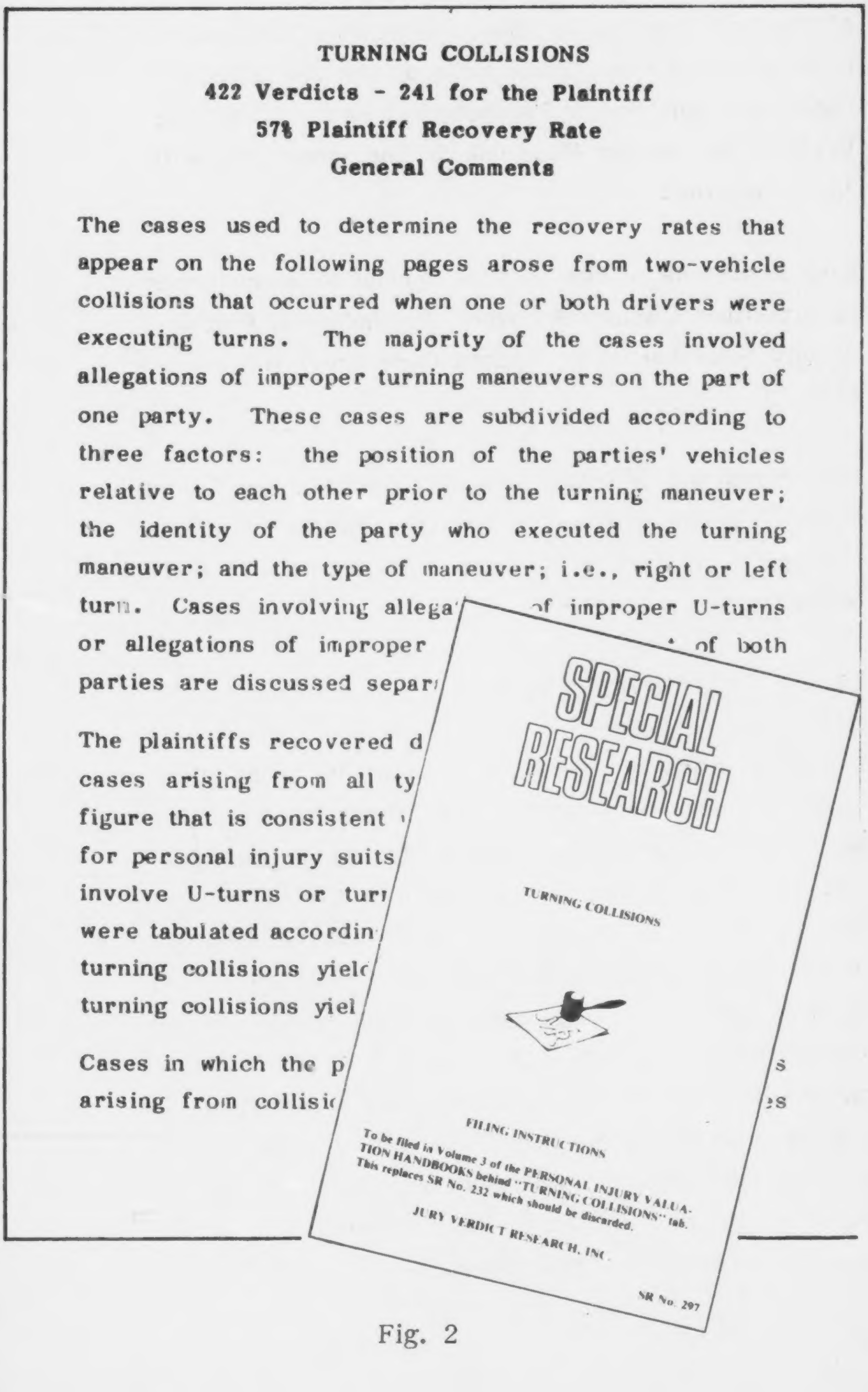
alcohol and drugs as an issue, and punitive damages, to mention only a few. **These make up the four volumes of Handbooks which cover Psychological Factors Affecting Verdicts and another Handbook dealing specifically with Juror Selection.**

Each month one release entitled **Special Research Report** covers either Liability Recovery, Psychological Factors or Jury Selection. They update these seven volumes (Fig. 2).

Each month a new Injury Valuation Report and a Special Research Report are sent to our thousands of subscribers, plus thousands more as requested and as part of the Handbooks for new subscribers.

TABLES TESTED FOR VALIDITY

Before we marketed the Personal Injury Valuation Handbooks, the data was tested. As predicted by Dr. Zeisel, we found that for similar injuries with similar economic loss, most verdict awards clustered near the midpoint verdict. This, Dr. Zeisel noted, confirmed the validity of the tables and the predictions and probabilities based on them. After our subscribers used the Probability and Verdict Expectancy Tables, we asked them how they compared with their trial experience. They informed us that they were generally consistent with trial results. In addition, attorneys and professors at various law schools compared the probabilities in the Handbooks with actual verdicts rendered in similar cases.



TURNING COLLISIONS
422 Verdicts - 241 for the Plaintiff
57% Plaintiff Recovery Rate
General Comments

The cases used to determine the recovery rates that appear on the following pages arose from two-vehicle collisions that occurred when one or both drivers were executing turns. The majority of the cases involved allegations of improper turning maneuvers on the part of one party. These cases are subdivided according to three factors: the position of the parties' vehicles relative to each other prior to the turning maneuver; the identity of the party who executed the turning maneuver; and the type of maneuver; i.e., right or left
turn. Cases involving allega
of improper U-turns
or allegations of improper
of both
parties are discussed separ

The plaintiffs recovered d
cases arising from all ty
figure that is consistent
for personal injury suits
involve U-turns or tur
were tabulated accordin
turning collisions yiel
turning collisions yiel

Cases in which the p
s
arising from collisi
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SPECIAL RESEARCH

TURNING COLLISIONS

FILING INSTRUCTIONS

To be filed in Volume 3 of the PERSONAL INJURY VALUATION HANDBOOKS behind "TURNING COLLISIONS" tab. This replaces SR No. 232 which should be discarded.

JURY VERDICT RESEARCH, INC.

SR No. 297

Fig. 2

They informed us that our tables "passed their tests." **Additional broad experience over the years revealed that Injury Verdict Expectancy and Liability Recovery Probability Tables are as actuarially sound as are the Life Expectancy Tables that are used by life insurance companies and lawyers.**

STATE VERDICT SURVEYS

Each year for each of the fifty states and the District of Columbia, we survey the verdict situation. A separate report for each state analyzes recent personal injury verdict activity and trends, and the verdicts in each geographic area within the state are compared to the national norm. The findings are illustrated with capsule reports of recent, important cases (Fig. 3). **For each state, these reports are called "Personal Injury Verdict Survey."** The reports for all 50 states are collected into three volumes entitled **The National Verdict Survey,** and are used by insurance companies, corporations and specializing lawyers who do multi-state business, to determine the local verdict situation in making evaluations of their cases. In addition, each month we publish a one-page **"Personal Injury Award Comparisons By State,"** which is of special interest to insurance companies (Fig. 4).

CASE EVALUATION SERVICE

We evaluate specific cases for our subscribers using our research tables. We furnish them a confidential report

NEW YORK VERDICT SURVEY
General Comments

Awards Averaged 13% Above National Verdict Expectancies

To determine the deviation of the size of personal injury awards rendered within New York from national norms, each reported plaintiff verdict was individually analyzed and tabulated. The plaintiff's injury, the claimed past special damages and the gross compensatory verdict were considered. The National Verdict Expectancy for a similar injury involving comparable past special damages was determined by consulting the tables located in the appropriate Injury Valuation Reports contained in the **Personal Inju**
Handbooks. The
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the applicable Verdict Ex
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Differences between the
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Verdict Expectancy,
calculation of the de
to a case in which
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current Verdict Ex
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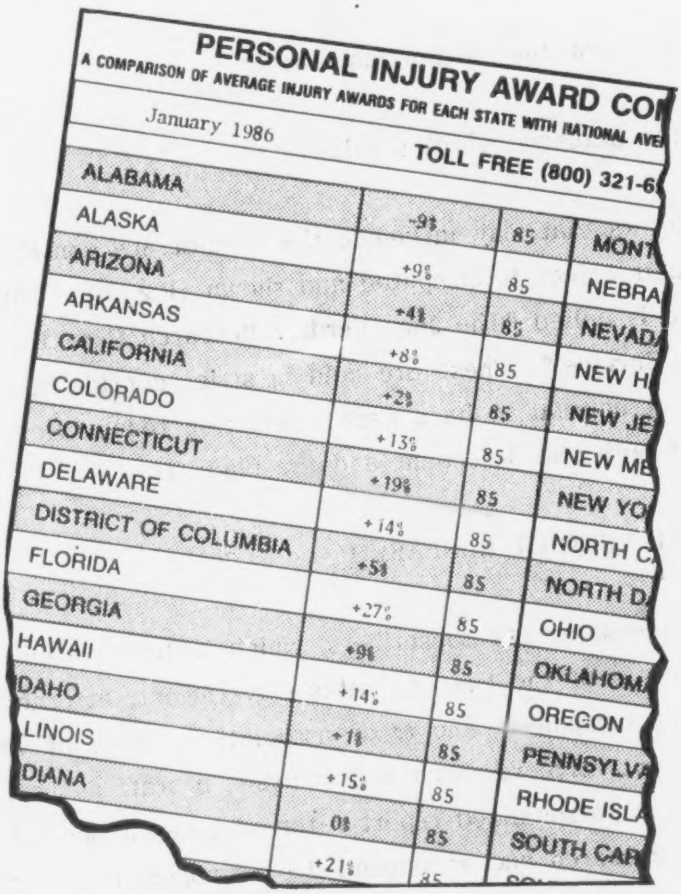
PERSONAL INJURY
verdict survey
NEW YORK EDITION
1986

JURY VERDICT RESEARCH, INC.

Fig. 3



PERSONAL INJURY AWARD CO

A COMPARISON OF AVERAGE INJURY AWARDS FOR EACH STATE WITH NATIONAL AVE

January 1986

TOLL FREE (800) 321-6

ALABAMA	-9%	85	MONT
ALASKA	+9%	85	NEBRA
ARIZONA	+4%	85	NEVAD
ARKANSAS	+8%	85	NEW H
CALIFORNIA	+2%	85	NEW JE
COLORADO	+13%	85	NEW ME
CONNECTICUT	+19%	85	NEW YO
DELAWARE	+14%	85	NORTH C
DISTRICT OF COLUMBIA	+5%	85	NORTH D
FLORIDA	+27%	85	OHIO
GEORGIA	+9%	85	OKLAHOM
HAWAII	+14%	85	OREGON
DAHO	+1%	85	PENNSYLV
LINOIS	+15%	85	RHODE ISL
DIANA	0%	85	SOUTH CAR
	+21%	85	

Fig. 4

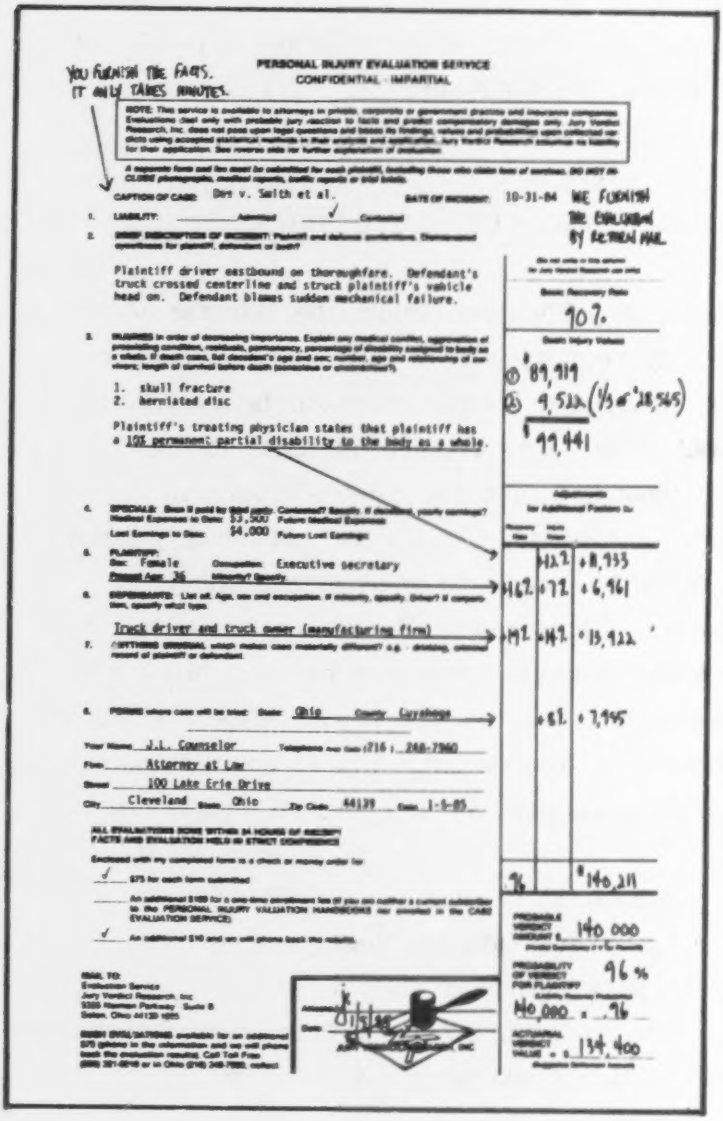
on the form filled out by the subscriber and attested by our professional evaluator showing:

1. the probability of verdict for the plaintiff;
2. the probable verdict amount;
3. the actuarial verdict value.

All factors that may influence the verdict are considered and their effect is computed and shown (Fig. 5). This service is called **"The Jury Verdict Research Case Evaluation Service."** These are held in strict confidence. It is not unusual to have Case Evaluation requests on behalf of both the defendant and the plaintiff.

SPECIAL VERDICT RESEARCH

Upon request by our subscribers, which include various departments of the United States Government, attorneys, insurance companies, and trade associations, some of whom request extensive research and analysis, a staff member prepares a personalized report referred to as a **Special Verdict Research** and accompanied by synopses of recent cases consisting of an analysis of awards and trends for specific information needs, such as: products, industries, professions, injuries, localities, and other situations.



YOU FURNISH THE FACTS.
IT ONLY TAKES MINUTES.

PERSONAL INJURY EVALUATION SERVICE
CONFIDENTIAL · IMPARTIAL

NOTE: This service is available to attorneys in private, corporate or government practice and insurance companies. Evaluations deal only with probable jury reaction to facts and predict compensatory damages only. Jury Verdict Research, Inc. does not pass upon legal questions and bases its findings, values and probabilities upon collected verdicts using accepted statistical methods in their analysis and application. Jury Verdict Research assumes no liability for their application. See reverse side for further explanation of evaluation.

A separate form and fee must be submitted for each plaintiff, including those who claim loss of services. DO NOT INCLUDE photographs, medical reports, traffic reports or trial briefs.

CAPTION OF CASE: Doe v. Smith et al. DATE OF INCIDENT: 10-31-84

WE FURNISH THE EVALUATION BY RETURN MAIL.

1. LIABILITY: ______ Admitted ✓ Contested
2. BRIEF DESCRIPTION OF INCIDENT: Plaintiff and defense contentions.

   Plaintiff driver eastbound on thoroughfare. Defendant's truck crossed centerline and struck plaintiff's vehicle head on. Defendant blames sudden mechanical failure.

3. INJURIES in order of decreasing importance. Explain any medical conflict, aggravation of preexisting condition, residuals, permanency, percentage of disability assigned to body as a whole. If death case, list decedent's age and sex; number, age and relationship of survivors; length of survival before death (conscious or unconscious?).

   1. skull fracture
   2. herniated disc

   Plaintiff's treating physician states that plaintiff has a 10% permanent partial disability to the body as a whole.

4. SPECIALS:
   Medical Expenses to Date: $3,500 Future Medical Expenses
   Lost Earnings to Date: $4,000 Future Lost Earnings
5. PLAINTIFF:
   Sex: Female Occupation: Executive secretary
   Present Age: 36 Minority? Specify
6. DEPENDANTS: List all. Age, sex and occupation. If minority, specify. Driver? If corporation, specify what type.

   Truck driver and truck owner (manufacturing firm)

7. ANYTHING UNUSUAL which makes case materially different? e.g. - drinking, criminal record of plaintiff or defendant.
8. FORUM where case will be tried: State: Ohio County: Cuyahoga

Your Name: J.L. Counselor Telephone Area Code (216) 248-7960
Firm: Attorney at Law
Street: 100 Lake Erie Drive
City: Cleveland State: Ohio Zip Code: 44139 Date: 1-5-85

ALL EVALUATIONS DONE WITHIN 24 HOURS OF RECEIPT
FACTS AND EVALUATION HELD IN STRICT CONFIDENCE

Enclosed with my completed form is a check or money order for

✓ $75 for each form submitted

___ An additional $100 for a one-time enrollment fee (if you are neither a current subscriber to the PERSONAL INJURY VALUATION HANDBOOKS nor enrolled in the CASE EVALUATION SERVICE)

✓ An additional $10 and we will phone back the results.

MAIL TO:
Evaluation Service
Jury Verdict Research, Inc.
5325 Naiman Parkway · Suite B
Solon, Ohio 44139

RUSH EVALUATIONS available for an additional $75 (phone in the information and we will phone back the evaluation results). Call Toll Free (800) 321-6910 or in Ohio (216) 248-7960, collect.

Attorney
Date

JURY VERDICT RESEARCH, INC.

Do not write in this column
for Jury Verdict Research use only

Basic Recovery Rate
90%

Basic Injury Values
① $89,919
② 9,522 (1/3 of $28,565)
$99,441

Adjustments for Additional Factors to:

Recovery Rate	Injury Values	
	+12%	+8,933
+16%	+7%	+6,961
+14%	+14%	+13,922
	+8%	+7,945
96		$140,211

PROBABLE VERDICT AMOUNT $ 140 000
(Verdict Expectancy if for Plaintiff)

PROBABILITY OF VERDICT FOR PLAINTIFF 96 %
(Liability Recovery Probability)
140,000 x .96

ACTUARIAL VERDICT VALUE = $ 134,400
(Suggested Settlement Amount)

Fig. 5

We also conduct, as requested, a **Personalized Verdict File Search**, without analysis. This is often used by trial attorneys for evaluation of cases and to show courts that the verdict under challenge is consistent or out of line with similar verdicts. This is probably our most requested type of research.

PERSONAL INJURY VERDICT REVIEWS

This research publication divides the universe of personal injury verdicts into 13 different quarterly reporters, referred to as the **"Personal Injury Verdict Reviews."** Each issue of each quarterly focuses on a specific topic and furnishes capsule reports of important, recent verdicts, settlements, and bench judgments, accompanied by statistical analyses and trend information. These reports furnish for the case cited, court docket numbers for entree to court briefs and transcripts, names of the lawyer, and expert witnesses plus other trial information. The 13 quarterlies, which are staggered so that one is published each week, are:

Commercial & Industrial Products
Physician & Hospital Negligence
Consumer Products
Food, Lodging, Sports, & Entertainment Facilities
Utilities, Construction, & Industry
Professional Negligence
Transportation Products
Public & Private Passenger Services

Trucking, Railroad, & Marine Lines
Retailing, Banking, & Other Service
  Establishments
Media & Government
Personal Liability
Vehicular Negligence

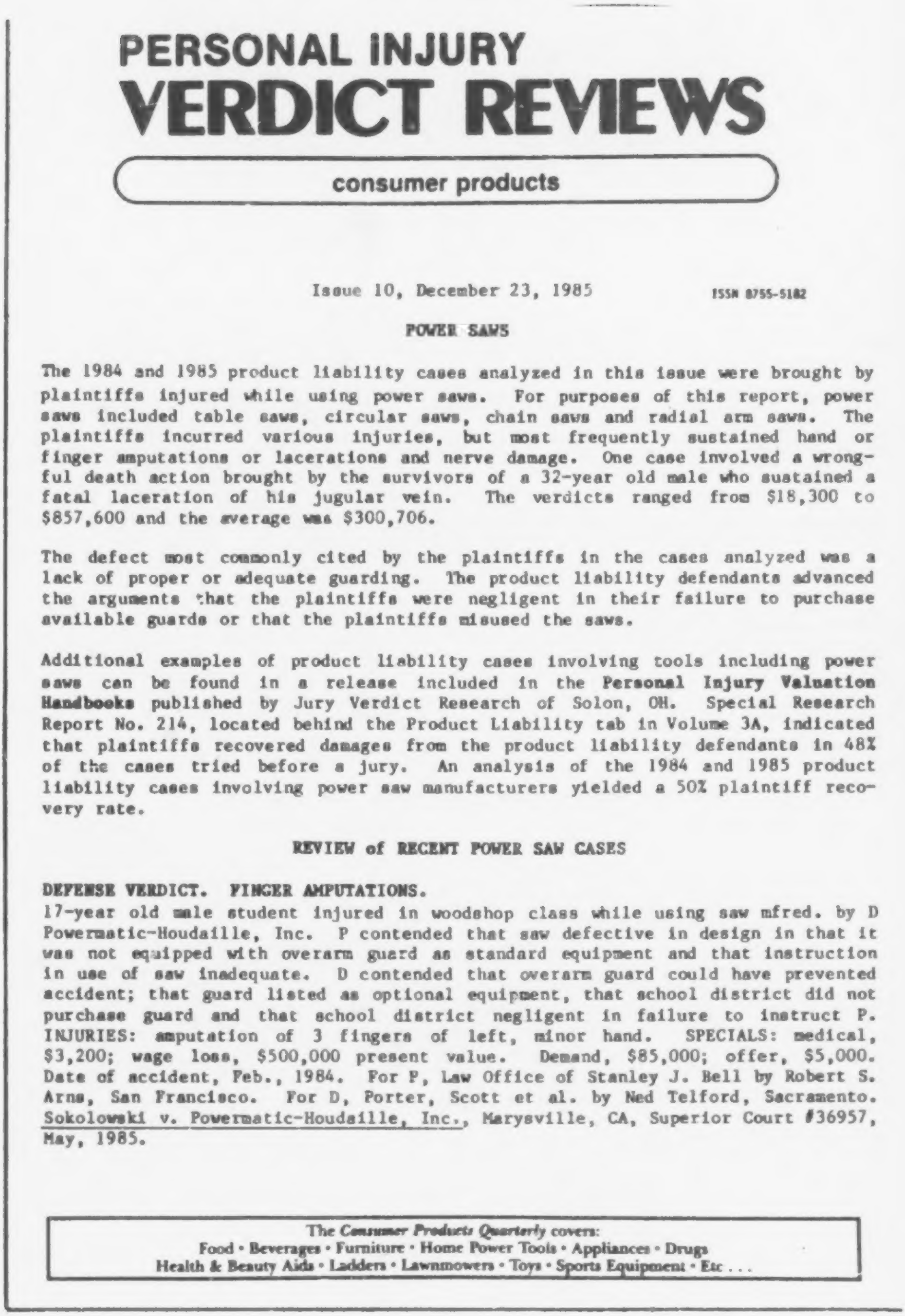
Subscribers may elect to receive all, or one or more of the quarterlies. These are collected into a two-volume set, along with an index (Fig. 6).

COMPREHENSIVE VERDICT SERVICE

In addition, because of requests, we will be providing weekly printouts of all new verdicts as soon as facts are collected and checked. These are also divided into 13 categories similar to Verdict Reviews. The printout is referred to as the **"Comprehensive Verdict Service"** (Fig. 7).

NEW VERDICT REPORTS

Because of numerous requests, we are getting ready to provide subscribers with a weekly eight-page computer printout of a cross-section of important verdicts and settlements covering all areas of injury litigation. This replaces our former Verdict Reports and is referred to as the **"New Verdict Reports"** (Fig. 8).



PERSONAL INJURY
VERDICT REVIEWS
consumer products

Issue 10, December 23, 1985 ISSN 8755-5182

POWER SAWS

The 1984 and 1985 product liability cases analyzed in this issue were brought by plaintiffs injured while using power saws. For purposes of this report, power saws included table saws, circular saws, chain saws and radial arm saws. The plaintiffs incurred various injuries, but most frequently sustained hand or finger amputations or lacerations and nerve damage. One case involved a wrongful death action brought by the survivors of a 32-year old male who sustained a fatal laceration of his jugular vein. The verdicts ranged from $18,300 to $857,600 and the average was $300,706.

The defect most commonly cited by the plaintiffs in the cases analyzed was a lack of proper or adequate guarding. The product liability defendants advanced the arguments that the plaintiffs were negligent in their failure to purchase available guards or that the plaintiffs misused the saws.

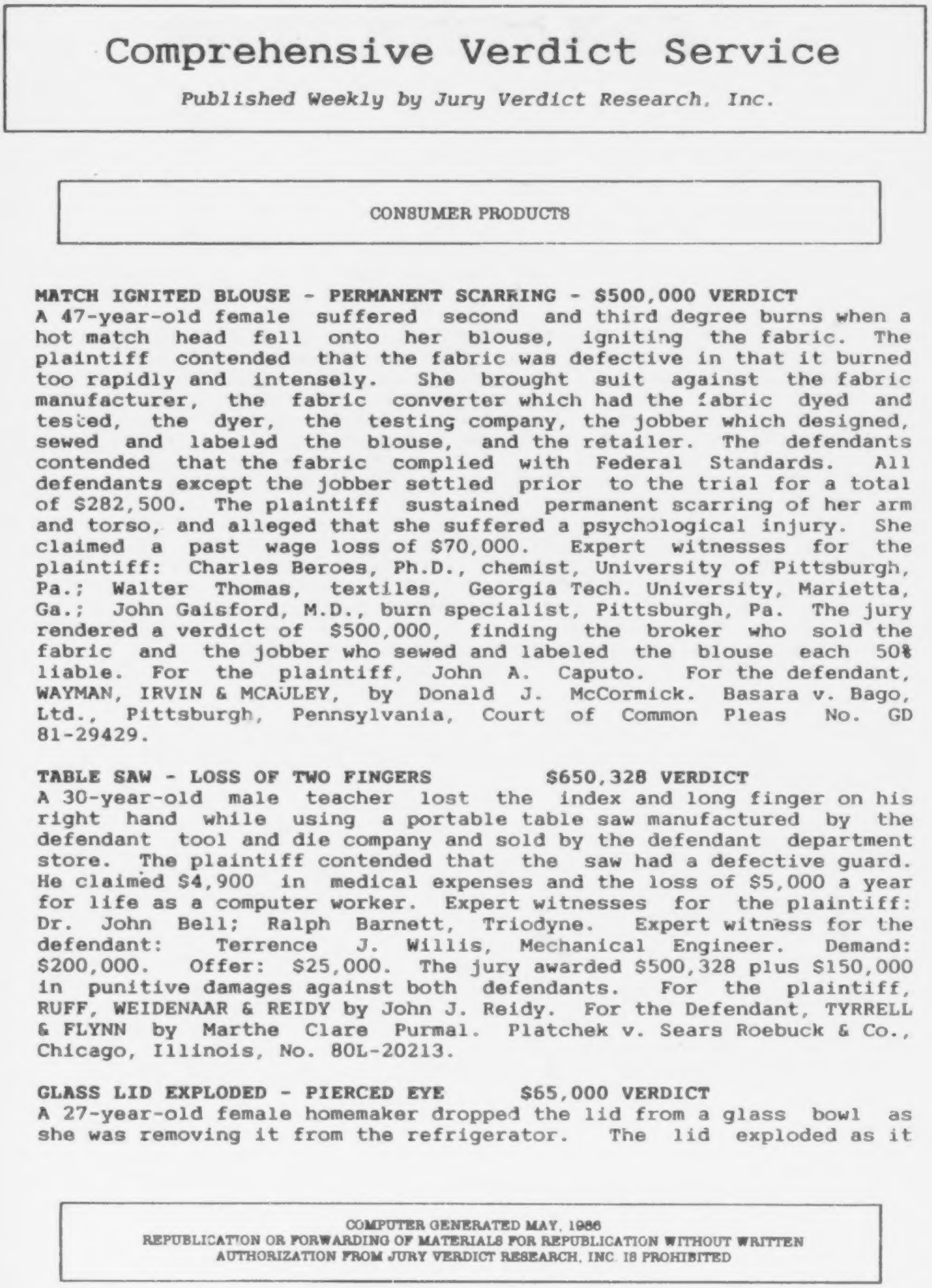
Additional examples of product liability cases involving tools including power saws can be found in a release included in the **Personal Injury Valuation Handbooks** published by Jury Verdict Research of Solon, OH. Special Research Report No. 214, located behind the Product Liability tab in Volume 3A, indicated that plaintiffs recovered damages from the product liability defendants in 48% of the cases tried before a jury. An analysis of the 1984 and 1985 product liability cases involving power saw manufacturers yielded a 50% plaintiff recovery rate.

REVIEW of RECENT POWER SAW CASES

DEFENSE VERDICT. FINGER AMPUTATIONS.
17-year old male student injured in woodshop class while using saw mfred. by D Powermatic-Houdaille, Inc. P contended that saw defective in design in that it was not equipped with overarm guard as standard equipment and that instruction in use of saw inadequate. D contended that overarm guard could have prevented accident; that guard listed as optional equipment, that school district did not purchase guard and that school district negligent in failure to instruct P. INJURIES: amputation of 3 fingers of left, minor hand. SPECIALS: medical, $3,200; wage loss, $500,000 present value. Demand, $85,000; offer, $5,000. Date of accident, Feb., 1984. For P, Law Office of Stanley J. Bell by Robert S. Arns, San Francisco. For D, Porter, Scott et al. by Ned Telford, Sacramento. Sokolowski v. Powermatic-Houdaille, Inc., Marysville, CA, Superior Court #36957, May, 1985.

The *Consumer Products Quarterly* covers:
Food • Beverages • Furniture • Home Power Tools • Appliances • Drugs
Health & Beauty Aids • Ladders • Lawnmowers • Toys • Sports Equipment • Etc . . .

Fig. 6



Comprehensive Verdict Service

Published Weekly by Jury Verdict Research, Inc.

CONSUMER PRODUCTS

MATCH IGNITED BLOUSE - PERMANENT SCARRING - $500,000 VERDICT
A 47-year-old female suffered second and third degree burns when a hot match head fell onto her blouse, igniting the fabric. The plaintiff contended that the fabric was defective in that it burned too rapidly and intensely. She brought suit against the fabric manufacturer, the fabric converter which had the fabric dyed and tested, the dyer, the testing company, the jobber which designed, sewed and labeled the blouse, and the retailer. The defendants contended that the fabric complied with Federal Standards. All defendants except the jobber settled prior to the trial for a total of $282,500. The plaintiff sustained permanent scarring of her arm and torso, and alleged that she suffered a psychological injury. She claimed a past wage loss of $70,000. Expert witnesses for the plaintiff: Charles Beroes, Ph.D., chemist, University of Pittsburgh, Pa.; Walter Thomas, textiles, Georgia Tech. University, Marietta, Ga.; John Gaisford, M.D., burn specialist, Pittsburgh, Pa. The jury rendered a verdict of $500,000, finding the broker who sold the fabric and the jobber who sewed and labeled the blouse each 50% liable. For the plaintiff, John A. Caputo. For the defendant, WAYMAN, IRVIN & MCAULEY, by Donald J. McCormick. Basara v. Bago, Ltd., Pittsburgh, Pennsylvania, Court of Common Pleas No. GD 81-29429.

TABLE SAW - LOSS OF TWO FINGERS $650,328 VERDICT
A 30-year-old male teacher lost the index and long finger on his right hand while using a portable table saw manufactured by the defendant tool and die company and sold by the defendant department store. The plaintiff contended that the saw had a defective guard. He claimed $4,900 in medical expenses and the loss of $5,000 a year for life as a computer worker. Expert witnesses for the plaintiff: Dr. John Bell; Ralph Barnett, Triodyne. Expert witness for the defendant: Terrence J. Willis, Mechanical Engineer. Demand: $200,000. Offer: $25,000. The jury awarded $500,328 plus $150,000 in punitive damages against both defendants. For the plaintiff, RUFF, WEIDENAAR & REIDY by John J. Reidy. For the Defendant, TYRRELL & FLYNN by Marthe Clare Purmal. Platchek v. Sears Roebuck & Co., Chicago, Illinois, No. 80L-20213.

GLASS LID EXPLODED - PIERCED EYE $65,000 VERDICT
A 27-year-old female homemaker dropped the lid from a glass bowl as she was removing it from the refrigerator. The lid exploded as it

COMPUTER GENERATED MAY, 1986
REPUBLICATION OR FORWARDING OF MATERIALS FOR REPUBLICATION WITHOUT WRITTEN AUTHORIZATION FROM JURY VERDICT RESEARCH, INC. IS PROHIBITED

Fig. 7

New Verdict Reports

Published Weekly by Jury Verdict Research, Inc.

BATTERY - FRACTURED SHOULDER VERDICT: $20,004

A 43-year-old barber suffered a fractured shoulder, knee and neck injuries and lacerations when he was struck by a police officer. The plaintiff contended that he was wrestled to the ground by the defendant officer, who kicked the plaintiff's legs out from under him. He further contended that his head was forcibly pounded into the pavement without provocation. The defendants alleged that the plaintiff struck the defendant officer when the officer attempted to issue a citation to the plaintiff for possession of marijuana. Demand: $25,000 six months before trial; $59,500 second day of trial. Offer: None. The jury awarded $20,004 to the plaintiff on his battery claim, and found for the defendant on false arrest and malicious prosecution charges. Expert witnesses for the plaintiff: Price Gripekoven, M.D., Orthopedist (Portland); Darrell C. Brett, M.D., Neurologist (Portland); Kathleen M. Galligan, D.C. (Lake Oswego); Terry Lee Tindall, Vocational Rehabilitation-Bittersweet Services (Portland); Nelson Crick, Ph.D., Economist (Portland). Expert witnesses for the defendant: Phaon Gambee, M.D., Orthopedist (Portland); Robert Dow, M.D., Neurologist (Portland); Robert Fry, M.D., Orthopedist (Portland). For the plaintiff: FREDERICK T. SMITH, by David D. Park. For the defendant: Harry Auerbach, Deputy City Attorney, Portland; J. Michael Doyle, Assistant County Counsel, Portland.
Larson v. City of Portland, Portland, Oreg., No. A8312-07767.

SLIP AND FALL - FRACTURED ANKLE DEFENSE VERDICT

A 25-year-old female suffered a fractured ankle when she fell on ice outside the defendant's building. She claimed $3,500 in medical expenses and $400 in lost wages. Expert witnesses for the plaintiff: Dr. Robert Burdge, Orthopedic Surgeon. Expert witness for the defendant: none. Demand: $17,000. Offer: none. The jury returned a defense verdict. For the plaintiff: Alvin Wolff, St. Louis. For the defendant: Harold Whitfield, St. Louis. Combs v. Food Maker, Inc., St. Louis, Mo., No. 84200346.

INSECT SPRAY IGNITED - THIRD DEGREE BURNS VERDICT: $2,762,465

A nine-year-old boy was suffered third degree burns to his chest, back, neck and upper arm when insect spray on his body ignited. The youth, who had just put mosquito repellant on his skin, walked across a carpeted room and turned on a television set. As he touched the set, a spark from static elctricity ignited the spray, inflicting severe burns. The plaintiff contended that the warning label on the spray, which contained 35% alcohol, failed to warn that a spark could ignite the spray after it was applied, but

COMPUTER GENERATED MAY, 1986
REPUBLICATION OR FORWARDING OF MATERIALS FOR REPUBLICATION WITHOUT WRITTEN AUTHORIZATION FROM JURY VERDICT RESEARCH, INC. IS PROHIBITED

Fig. 8

PERSONALIZED VERDICT REPORTING SERVICE

Each month we send all verdicts of the specific kinds that are requested by the subscriber. This may include specific liability situations, injuries, verdicts for certain areas and large verdicts, to mention a few. This is referred to as **"The Personalized Verdict Reporting Service."**

HAVE VERDICTS RECENTLY SKYROCKETED?

You ask for, **"The trend regarding jury verdicts over the past ten years, including various categories such as product liability and medical malpractice."** This question is considered in our latest issue of the **Current Award Trends**, which is published annually in January, and which includes nationwide verdict activity over a 10-year period. The evidence suggests that a substantial but uneven increase in verdict awards has been occurring for years. For the past 10 years, the average yearly increase in verdict awards is 15.23%. For 1984 it was 15.36%, and for 1985, the increase is 12.24% using incomplete figures. However, higher increases were recorded for five of the 10 years:

1976	16.61%
1979	17.71%
1980	24.54%
1981	30.49%
1983	27.54%

The increase in 1981 was almost twice that of 1984, and 2-1/2 times the preliminary figure of 12.24% for 1985. You will note that verdicts peaked in 1981, and have been decreasing since. Our report gives equal weight to changes in the midpoint verdict and the **unadjusted** verdict average. The unusually high verdicts rendered in some years do, unquestionably, affect the unadjusted averages. If verdicts of high and low extremes were excluded from these calculations, we believe that the fluctuations would be smaller and the yearly average increase would also be somewhat smaller. Next year we will publish Current Award Trends that are computed both with and without the verdict extremes.

COMPARISON WITH OTHER RELEVANT INDEXES

In 1984 the average increase of the Consumer Price Index was 7.8%. Many of the largest increases in verdicts coincide with the highest increases in the Consumer Price Index; for example:

1979	17.71%	C.P.I.	11.5%
1980	24.54%	C.P.I.	13.5%
1981	30.49%	C.P.I.	10.3%

The United States Government Health Care Financing Administration, Office of the Actuary, notes the average annual growth rate for health care for 1978-1984 at:

14.4%	inpatient
18.4%	outpatient
14.5%	physicians

In addition, over the ten-year period covered by this report, there were substantial increases in wages, salaries and earnings of the various members of the public. When injured, there may be a claim of loss of earnings, which also reflect these increases. There is no question that out-of-pocket medical and loss of earning specials are important factors entering in the size of verdict awards. Further increasing the medical expenses is the additional amount incurred due to the increased tendency to medically rehabilitate the seriously injured. This often means an increase in loss of earnings because of additional loss of time from work. Lawyers and insurance executives consider these out-of-pocket expenses in determining valuations, and so do jurors.

PRODUCT LIABILITY AND MEDICAL MALPRACTICE VERDICT TRENDS

When considering product liability and medical malpractice verdict awards, it must be noted that **Current Award Trends** considers only the size of the plaintiff verdict. We do not factor in defense verdicts, for that would be misleading as the percentage of plaintiff awards vary, depending on the specific product, and in malpractice, who the defendant is.

For example, Product Liability - % Plaintiff Recovery Rate:

41%	consumer product
41%	food & beverage containers
48%	vehicle manufacturers
44%	beauty products & toiletries
57%	industrial equipment
70%	presses
60%	drugs & pharmaceuticals
48%	tools
69%	asbestos
41%	household appliances

For example, in cases involving medical malpractice, the % Plaintiff Recovery Rate is:

28%	against physicians
46%	hospitals
39%	against physicians and hospitals

Overall, the plaintiff recovery rate is 60% for 1986; 26 years ago it was also 60%. There has been some fluctuation during the years, but not much. For some years prior to this year, it was 57%. For product liability, the 1986 rate is 64%; in 1978 it was 52%. It is to be noted that the recovery rate for product liability has substantially increased in the past eight years. It is obvious that the medical malpractice plaintiff recovery rate is well under 50%.

MIDPOINT VERDICT MOST IMPORTANT CRITERIA IN DETERMINING TRENDS

Because the majority of verdicts tend to cluster around the midpoint verdict, it is the most important figure when assessing trends.

PRODUCT LIABILITY TRENDS

It is significant to note that the product liability midpoint verdict, which includes million dollar verdicts, has remained relatively stationary:

1980	$225,000
1981	325,000
1982	300,000
1983	300,000
1984	300,000

Although there is a significant upward trend in the number of plaintiff verdicts rendered for product liability (109 in 1975 to 337 in 1984), no recent surge is shown. 1984 shows a decrease over 1983:

1983	283	plaintiff verdicts plus
	90	million dollar verdicts
1984	251	plaintiff verdicts plus
	86	million dollar verdicts
1985*	71	plaintiff verdicts plus
	41	million dollar verdicts

*statistics for 1985 are incomplete

MEDICAL MALPRACTICE TRENDS

The midpoint verdicts, which include million dollar verdicts, also appear to have largely stabilized:

1980	$200,000
1981	300,000
1982	200,000
1983	260,476
1984	200,000
1985	245,000 (incomplete)

However, the number of malpractice verdicts has increased sharply over the ten-year period, from 78 in 1975 to 356 in 1984, and so have the number of million dollar verdicts, though the million dollar awards increased by only one over 1983. Surprisingly, although the number of million dollar verdicts has surged, the midpoint verdict was higher in 1981 ($300,000) than in 1984 ($200,000) or even the incomplete 1985 figure of $245,000.

Without question there are singularly large awards included in the category of million dollar verdicts for each year:

1975	$5,200,000	1980	$4,440,000
1976	9,341,683	1981	15,000,000
1977	10,150,000	1982	13,673,587
1978	127,841,000	1983	106,800,000
1979	15,650,000	1984	22,285,000

These are only the highest ones for each year that are noted herein. There are other very high awards for most of these years.

A similar range of verdicts is evident in awards for medical malpractice. Some may not be justified by the facts of each case, but they do not appear indicative of a "runaway verdict" trend.

Within the jury system there have always been verdicts that were considered either excessive or inadequate. However, our system of jurisprudence provides litigants with various review processes as a means of redress. Many of the very high verdicts used in our averages, as well as those cited, may have been decreased by the Courts and/or through settlement negotiation.

YOU ASK, "HOW ONLY THE 'BEST' CASES EVER REACH TRIAL, THEREBY CREATING JURY VERDICTS THAT ARE HIGHER THAN MIGHT OTHERWISE BE EXPECTED?"

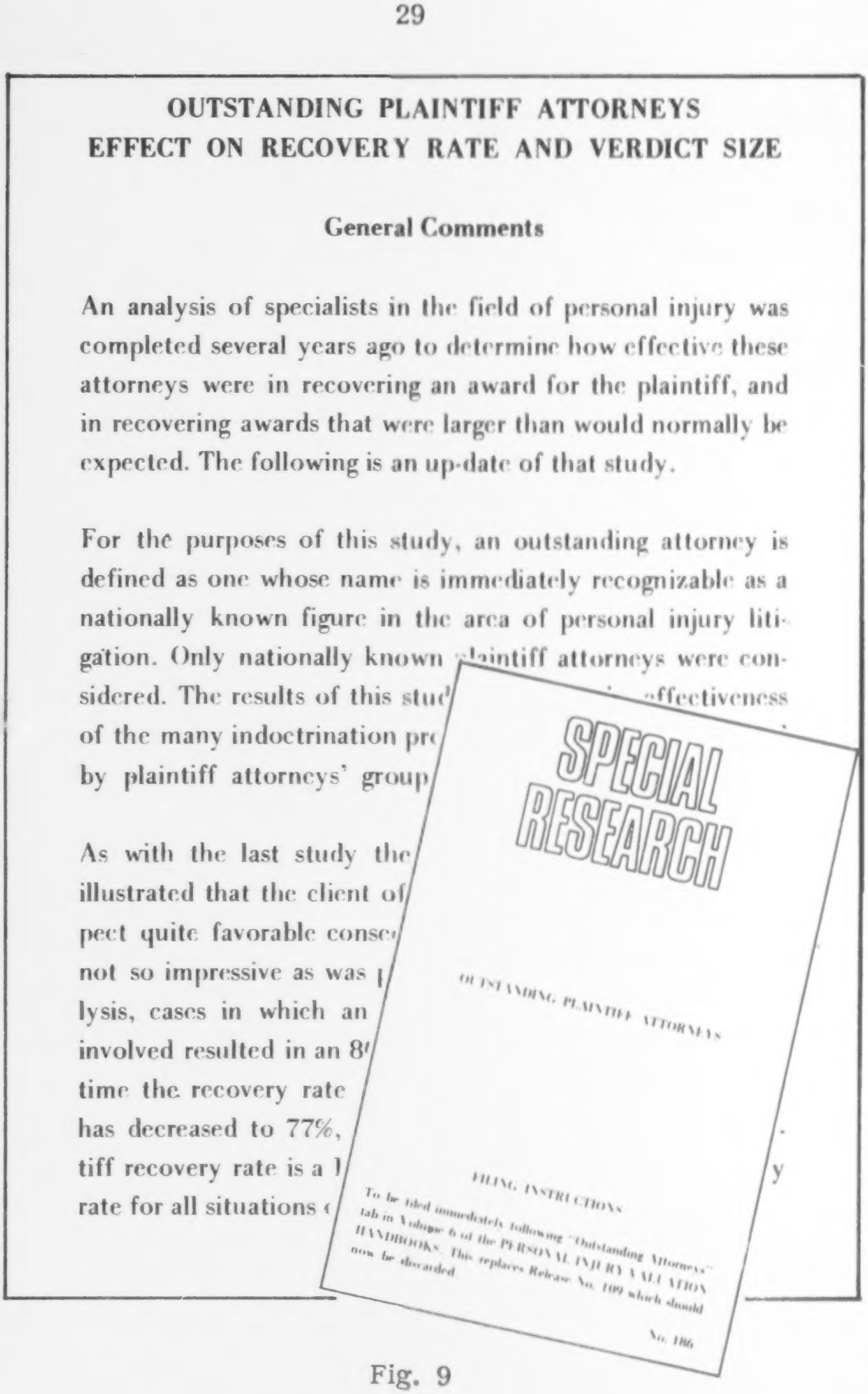
Although young and inexperienced lawyers may proceed to trial with cases involving only minor injuries and very doubtful liability, the best trial lawyers cannot afford to do so, nor would they consider such time as well spent.

Major injury cases, particularly for product liability and malpractice, require so many expert witnesses - both medical and non-medical - and so many depositions, hearings, and expensive exhibits, that only plaintiffs with serious injuries have sufficient potential to reasonably compensate the plaintiff's lawyer for out-of-pocket expenses, for the time of the attorney, associates, paralegals and secretaries. It must be remembered that, even with careful selection, in a large percentage of these cases the jury will find for the defendant and yield the plaintiff's trial lawyer nothing for his or her time and expenses.

You must also remember that, generally, the best trial lawyers may be opposed by equally competent defense lawyers. The verdicts that result may be high because the injuries may be serious and the economic losses large. However, regardless of size, the verdict may fall within the probability range for similar serious injury claims. This would not necessarily result in jury verdicts that are higher than might otherwise be expected. However, JVR's study on "Outstanding Plaintiff Attorneys" (No. 186) did demonstrate that outstanding plaintiff lawyers do, with some frequency, obtain higher verdict awards for similar injuries than do their less skilled colleagues (Fig. 9).

WHAT IS JVR's TREATMENT OF SETTLEMENTS, REMITTITURS AND ADDITURS?

Our publications clarify that, for statistical purposes, we collect and use only unadjusted verdicts. We do not attempt to follow what happens to verdicts subsequent to the jury action. This is for other services.



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OUTSTANDING PLAINTIFF ATTORNEYS
EFFECT ON RECOVERY RATE AND VERDICT SIZE

General Comments

An analysis of specialists in the field of personal injury was completed several years ago to determine how effective these attorneys were in recovering an award for the plaintiff, and in recovering awards that were larger than would normally be expected. The following is an up-date of that study.

For the purposes of this study, an outstanding attorney is defined as one whose name is immediately recognizable as a nationally known figure in the area of personal injury litigation. Only nationally known plaintiff attorneys were considered. The results of this stud effectiveness
of the many indoctrination pr
by plaintiff attorneys' group

As with the last study the
illustrated that the client of
pect quite favorable conse
not so impressive as was
lysis, cases in which an
involved resulted in an 8
time the recovery rate
has decreased to 77%,
tiff recovery rate is a y
rate for all situations

SPECIAL RESEARCH

OUTSTANDING PLAINTIFF ATTORNEYS

FILING INSTRUCTIONS

To be filed immediately following "Outstanding Attorneys" tab in Volume 6 of the PERSONAL INJURY VALUATION HANDBOOKS. This replaces Release No. 109 which should now be discarded.

No. 186

Fig. 9

JVR'S INFLUENCE ON INSURANCE COMPANY SETTLEMENTS

The Subcommittee is also interested in "Your views regarding whether your figures regarding the average jury verdict can in any way be equated with the amounts actually paid out in claims by insurers."

The answer is "yes" for many companies, and "no" for some. Many companies use actuarial verdict data to help evaluate the value of claims. From my observation, I believe their evaluations are generally sound. For the very serious injury cases, they often secure a professional evaluation using the Case Evaluation Service. Other claim executives believe that they know what's going on by their trial experience (often surprisingly few cases), their local defense lawyers (likewise, directly and indirectly involved with comparatively few verdicts), augmented by reading in their news sources about verdicts - usually the very large ones - plus their settlement experience. At best, such evaluations can be described as the partially educated guess. Many years ago I wrote an article for the Insurance Law Journal which demonstrated that such strategy more often resulted in overpayments and also generated more litigation.

Representing insurance carriers, it has always surprised me how the evaluations of value of similar injury claims varied so widely among different companies, even for claims which they see with frequency, such as cervical strain. Of course, all claim executives believe their evaluations are sound because they have been evaluating claims for so many years. Their "experience" may be simply repeating the same evaluation philosophy - often far from the reality of what juries are really awarding. **Unfortunately for their companies, they often believe that juries award larger verdicts than they really do.**

Unless they check their beliefs with the trial of many lawsuits over a wide range of injuries, severities, and liability situations, or with actuarial verdict information, they can never know whether their evaluations are consistent with the actual world of verdicts or out of line.

I am continually amazed at the numerous settlements for far greater amounts than could be reasonably expected for a similar case by a jury. Typical of many settlements that we see is that of the insurers of two physicians in Albany, New York, who settled a recent claim of malpractice for $680,000. Had the physicians' insurance carriers consulted the actuarial tables, they would have noted that the probable verdict amount was $250,000, with a 46% probable verdict recovery rate and an actuarial verdict value of $115,000.

If such payments of almost six times the actuarial verdict value and more than twice the probable verdict amount were only occasional occurrences, it would not be as important as it is. We see many such settlements. It is obvious that the insurance carrier's representatives were influenced by the high verdict awards reported by the news media, and not through the use of a broad base of verdict information.

Ironically, many of the same claim executives, when concerned about underwriting losses, try to control costs - but so often with the wrong cases. Again, using the **partially-educated guess, they often reject reasonable plaintiff demands, only to be shocked by a much higher verdict.**

This is illustrated in the case of McKinney v. Electro Management Corporation, et. al.:

> A 13-year-old hemophiliac plaintiff, struck by a vehicle making a left turn, contended that the defendant collided with him while he was in the crosswalk. The defendant driver contended that the plaintiff rode his bicycle into the path of his vehicle, and he was unable to avoid the collision. The plaintiff sustained residual necrosis of the femoral head. He claimed medical expenses of $250,000. The plaintiff's demand for $600,000 was countered by the defendant's offer of $35,000, increased to $125,000 during the trial. A jury awarded the plaintiff $1,500,000.

The case evaluation determined an 80% probability of a verdict for the plaintiff, a $2,000,000 probable verdict, with a $1,600,000 actuarial value. It is obvious that the defendant's insurance carrier did not use actuarial tables.

I submit that if all insurance companies used actuarial verdict information in making settlement decisions, there would be a substantial effect on the amount paid out in claims - in all probability millions of dollars less. When plaintiff attorneys make realistic demands, and many do, prompter settlements with less litigation would have occurred, with substantial savings in defense costs.

JURORS GENERALLY ARE FAIR IN THEIR VERDICTS

This means that those who manage and evaluate claims, by failing to realize that much lower monetary values are often assigned by jurors than are generally believed, are needlessly paying out their companies' funds.

As a personal injury trial lawyer of some 40 years, I have tried many personal injury cases and have interviewed the jurors seated for most of those cases. I must confess that I have been impressed, with few exceptions, by the ability of the juries to resolve personal injury disputes in a fair and even-handed manner. **Juries reflect the community's prevailing social and cultural concerns and standards in their application of the law to the circumstances of each litigant in each individual case.**

I was recently invited to participate in the Warren Conference of the Roscoe Pound Foundation at Harvard University School of Law. The participants included well-known judges, outstanding trial lawyers for the plaintiff as well as for the defendant, eminent sociologists, and highly respected professors of law. It was interesting to note that the **unanimous opinion of those participants was an admiration for the jury system in action.**

Of course, juries occasionally do "go wrong," awarding money when it should not be awarded, and for outrageous sums.

In observing verdicts over the years, I can't help being impressed by the fact that they generally cluster around the median verdict for any given injury with similar economic losses as reflected by the out-of-pocket medical and wage loss, with only a handful of verdicts seriously deviating from the median.

Even in cases of liability, the similarity over the years is astounding. Overall, 26 years ago, 60% of the verdicts were for the plaintiff. A few hours ago a new calculation was made. It is still 60%. Given almost any liability circumstance (but not all), the plaintiff recovery rate is generally comparable today to what it was 26 years ago.

I submit that generally jurors are more consistent in their awards than are judges, trial lawyers, and claim executives in evaluating claim values. The problem is not that the jurors are out of control, or, with exceptions, make ridiculous awards, but the problem is the effect that newspaper reports of very high verdicts, which may or may not be justified by the facts, have upon the public, the lawyers, and the insurance carriers. Equally important is that although jurors award money in only 60% of the cases tried, it is quite rare to see a file in litigation closed without payment or a trial.

Although we collect and process approximately 2000 verdicts each month (approximately 24,000 verdicts a year), in 1984 only 401 verdicts were awarded for one million dollars or more. Most, if not all of these million dollar awards are the subject of at least one news media story, which is featured prominently and often syndicated nationally. As a result, **a minority of large verdicts exert an exaggerated influence on settlements.** Even though the verdicts are subsequently reduced or reversed, they seldom get media attention. If they do, they rarely rate the headlines of the large verdict.

Generally, only the small amount of very high verdicts, numbering in the hundreds, are newsworthy. Often because of limited information furnished to news reporters, it would appear that the jurors for questionable liability have awarded the plaintiff a large sum of money for comparatively minor injuries. This gives the public the impression that their injuries, regardless of the facts of liability, will be compensated by an insurance carrier and that they will be able to retire with the proceeds. The attorneys whom they engage, as well as the lawyers representing the insurance carriers, may not be any more knowledgeable.

Of course, many lawyers representing plaintiffs, defendants, and insurance company personnel do make it a point to obtain verdict information on a broad scale so that they are aware that jurors are far more conservative than their less-informed colleagues.

One fact that many people, including lawyers and insurance carrier personnel, do not realize is that only a small number of personal injury cases go through jury verdict. A number of years ago I completed a study that indicated that on a national basis, only about three of every 100 lawsuits filed proceed through jury verdict. In some jurisdictions, there may be no personal injury cases tried to a verdict for several years, while in other areas the ratio may be as high as 10%.

I do not believe that there has been a substantial change from the study referred to above. No one seems to be able to determine, other than by broad guesses, the percentage of personal injury claims that are settled or abandoned without litigation.

My experience with insurance companies is that they want to be fair. They want to promptly settle their claims for a reasonable amount without a lawsuit. They reluctantly enter into litigation. Many will pay substantial sums just to avoid litigation, even when they are convinced that the plaintiff would receive nothing at the hands of a jury.

The outstanding plaintiff attorneys do not deem it good business to handle claims that either have questionable injury or no liability. They carefully screen what they will accept, and they are not interested in handling claims simply to get an insurance settlement.

I submit that on a short-term basis, paying defense costs may be good business, but on a long-term basis it is needlessly expensive. The experience of some insurance companies reveals that once the attorneys in a locale recognize that an insurance company will pay only meritorious claims and will fight those in court that are not, it is surprising how most of the claims without merit disappear. I submit that insurance companies can save many millions of dollars in the long run by refusing to pay the defense costs on claims that are without merit.

On the other hand, lawyers representing the injured parties, especially those who are active in such representation, are anxious to settle their claims promptly and for reasonable sums, considering the facts.

They recognize that regardless of how good the liability may be, juries can, and do come in with defense verdicts. They also recognize that it costs them money and valuable time to engage in the enormously time-consuming deposition process necessary to prepare today's serious injury case. In addition, expert witnesses and exhibits are also costly. As one prominent plaintiff attorney said, "I expect to have my client settle if we can, for less than a jury would award." He would discount settlement for preparation costs not yet incurred, less the value of the time it would take to prepare and try the case.

Although insurance companies and plaintiffs' counsel are sincerely interested in prompt and fair settlements, the reason that these do not always occur is that we are in an age of information, and one side or both do not furnish sufficient valid information. Demands and offers unsupported by valid value evidence are suspect, and so often do not motivate the parties to settle.

HOW SETTLEMENTS COULD BE ARRIVED AT EARLIER, WITHOUT LITIGATION AND FOR REASONABLE BUT FAIR AMOUNTS

We submit that if all insurance companies and self-insurers used the actuarial verdict information that is available to them to evaluate their claims; then had their representatives sit down with the plaintiff's counsel and make offers based upon what a jury would most likely do, and show how they arrived at the valuations and what they are based on, this would result more often

in prompt settlements. Likewise, plaintiff's counsel should support their demands with similar data. I submit that if this is done, insurance carriers will save many millions of dollars, and plaintiff's counsel would accomplish earlier, reasonable settlements with less litigation, less of their time, and less out-of-pocket expenses. I submit that the net to the injured party would be comparable, and the hourly return of plaintiff's counsel much higher.

Another problem is often encountered. The skilled personal injury lawyer may realize that the offer is fair, but have trouble convincing his client, who believes from reading his newspaper that he is entitled to far more money than offered. If the insurance company provides actuarial data concerning the valuation, the attorney has the means to convince his client to accept the offer.

AN IMPORTANT CAUSE OF THE INSURANCE CRISIS TO SOME COMPANIES

The causes are complex and many. It is clear that the verdicts of the jurors is what sets the ultimate market for the settlement of claims.

It would appear that some companies did not bother to find out, though the information was available, that starting in 1979 verdicts began to rise rapidly. From a 6.5% increase in 1978, they rose to 17.71% in 1979, 24.54% in 1980, and 30.49% in 1981. In 1983, the verdicts started to decline, going to 27.54%; in 1984 to 15.36%; and in 1985 to 12.24% (information for 1985 not complete).

As we all know, there is a substantial lead time in insurance from premium to payment for claims incurred. This period, especially for the more serious claims, is often years. Where the court dockets are clogged and take many years for a lawsuit to go to trial, the time period could be five or more years.

Had the underwriters of such companies kept informed, they would have known that starting in 1979 the claim market; namely, what jurors were currently awarding, started to increase substantially, more than doubling from the previous year. Had the underwriters adjusted the premiums in accordance with the yearly increase, the rise in premiums would have been gradual and they would have avoided having to recently double, triple and quadruple many premiums all at once. Unfortunately, even companies that were aware of the sharp increase in verdict size, to compete, charged smaller premiums than they had expected. More tragic to some insurance companies was that they failed to charge adequate premiums and subsequently were forced to pay out much more money in claims and claim costs, even considering investment income, than they had anticipated.

It is submitted that had all the insurance companies received the actuarial information published by Jury Verdict Research, Inc., and had they taken proper action, in all probability, although the insurance industry would still face serious próblems, there would presently be less of a so-called insurance crisis.

Then, those in charge of reserving in those companies, had they known of the rise in verdicts that was occurring, would have gradually increased their reserves. They would not have found themselves as many insurance companies did in the recent period, having to increase reserves by large amounts. Many such companies suddenly discovered that they did not have the financial reserves to continue writing all of the previous lines or new business, and in fact some went into insolvency.

Further, had the people in the same companies who are in charge of assigning value and managing claims realized the large increase that was going on, they would have made greater effort to promptly dispose of claims and lawsuits.

There is some suspicion that some insurance companies earning 20% on their investments were in no hurry to pay the money out in claims. If so, such companies may have figured that less the cost of administering the claims and attorney fees, they would be earning a substantial amount of money. But because they did not realize that while they were perhaps netting 10% on the reserves in those years, the cost of claims was going up by 30%. The results, of course, were the large, unexpected underwritng losses and overall losses incurred by such insurance companies.

The tragedy to the public, particularly business, is that such insurance companies, because of their failure to keep informed in this age of information, without realizing it, had depleted their capital and reserves and were unable to provide renewal coverage for many policy holders and write new business. Unfortunately, other companies, because of competition pressures, were also adversely influenced.

EMERGING LIABILITY AND THE NON-AVAILABILITY OF INSURANCE

One of the greatest problems facing insurance companies is that of emerging liability, especially where the premiums were based on non-liability situations that are swept away by court decisions and legislative action. Sometimes payments arise for coverage of tens of years ago that the companies had no reason to anticipate years later. Asbestos cases are an example. The evaporation of the sovereign immunity of governmental units has compounded this dilemma. Many insurance carriers are declining to write, or not continuing to write, this type of coverage because they are uncertain about how to realistically compute premium rates. Some insurance underwriters in companies that have the capacity to write but decline to do so, have little or no knowledge of jury verdicts involving governmental units.

Actually, sovereign immunity has been evaporating for many years. There is a substantial data base of information on the verdict expectancies for local and state governmental units. We have in our files hundreds of verdicts and our staff can and does analyze these for the government, including the United States Government, corporations, insurance companies, lawyers, and trade associations. We submit that if carriers that have the financial capacity wish to underwrite governmental units, that the data base presently exists to enable the insurance carrier to make a valid decision whether the risk is acceptable and to establish a realistic premium.

Likewise, many businesses, especially those for product liability coverage, also have the problem of obtaining insurance for a reasonable premium. We submit that for many product lines, our files have sufficient information to enable insurance companies that have the capacity and wish to do so to validly rate and write such product liability insurance. Likewise, our files on medical malpractice verdicts can assist underwriters.

Although the problems facing the carriers are complex, and some may need legislative or congressional action, we submit that if the insurance carriers use the actuarial jury information available to them and presently used by many carriers, they can save hundreds of millions of dollars; and can, with reasonable anticipation of underwriting profit, underwrite on a reasonable basis, many of the areas that they now either are afraid to underwrite or for which they set premiums that the market may not support.

Thank you for soliciting my views on the so-called "Insurance Crisis." I hope I have been of some assistance.

Philip J. Hermann

Philip J. Hermann
Chairman of the Board

Mr. **Herman**. Thank you, Mr. Hermann. I spent a considerable amount of time last night reviewing the facts and statistics and charts that you included in your testimony. In fact it was during the Monday night football game that I was reviewing it. But a couple of things rise to the surface.

Mr. **Hermann**. Let me point out something to you. Unfortunately several of the charts are missing in the report sent you. I recommend that you and the committee use the yellow covered one, because there are some new charts in it. Several more important charts are in process and will be furnished you later.

Mr. **Herman**. We will include in the record any additional charts that you submit.

Mr. **Hermann**. Right. Thank you. Go ahead. I am sorry.

Mr. **Herman**. One factor that seems to come out of your statement—and I believe you expressly assert it at the outset—is that the uncertainty, or the growing uncertainty, in product liability cases as to the outcome, as to the liability of the defendant, has exacerbated the lengthiness of litigation and has led to increased costliness of products litigation. Is that a correct statement?

Mr. **Hermann**. Well, yes and no. What it really is: We are dealing with liability subjects that are relatively new. Twenty years ago, I delivered a paper that John Hill wrote based on one case that predicted strict liability, which is the problem area we have today. That was 20 years ago. Now, really, product liability is an emerging field. People get hurt in new ways by new products. Now it is not that product liability is unpredictable. We do have a large data bank of information, of verdicts, that we can use for valid prediction. It is that many insurance companies were not using the information available. A lot were, and they were getting good results. A lot of lawyers are using our verdict expectancy tables, and unfortunately a lot are not.

Now, more lawyers and insurance companies are beginning to realize, for self-interest, they had better use our data bank. And then there is another aspect, too, which I did not mention.

Jurors are much more conservative than many an insurance company payout, surprisingly. Insurance executives read about these big verdicts in the newspapers and they think the jurors have gone haywire. They do not know what really happened.

And the result is the authorized settlement is frequently twice what a jury would give. We see that all the time. So that is another aspect of the problem.

Mr. **Herman**. Thank you, Mr. Hermann. As you are undoubtedly aware, your reports, your statistics, have been used in a variety of contexts, and I believe in testimony you submitted to the House Banking Committee, you indicated that in some instances your information has been misused.

Mr. **Hermann**. Yes.

Mr. **Herman**. I believe, as a result of that testimony, and the awareness of many of this committee of some of those applications of your statistics, that some members would like to address additional questions to you and they will be submitting them in writing. Thank you.

Mr. **Hermann**. You mean they will put them in writing. Certainly. I will be happy to answer them.

Mr. **Herman**. Thank you. Mr. Roper.

STATEMENT OF ROBERT T. ROPER

Mr. **Roper**. My name is Bob Roper. I am director of the Court Statistics and Information Management Project at the National Center for State Courts. I do appreciate this opportunity to again explain some findings of the study that we released last spring which has also been quoted, and misquoted, on occasion.

I would also like to point out that I am not an attorney and therefore cannot comment on the substantive law in bill 2760 now before this committee, nor does the statistical report of the National Center for State Courts reflect on the substantive law.

This study was first undertaken to test a general proposition on the propensity of litigants to sue, and was initiated prior to the current debate on the national insurance premium crisis. Therefore, the project's initial work looked at torts as well as contracts, real property rights cases, and small claims cases.

And the general finding of that report, which was released last spring, based upon data from all of the State administrative offices of the courts that reported such data, was that a careful examination of available data from these representative States provides no evidence to support any assertion of a steep, continuing upward trend of the referenced civil case filings in the State trial courts during the years 1981 through 1984.

I would like to emphasize here that these data talk about State trial courts, which represent between 95 and 97 percent of all civil litigation in this country.

The major point to be made here is that the number of civil filings are cyclical. They go up and they come down, and they vary among the States, but that generally speaking, there is no national pattern of a steep upward trend. With that finding, the research was drawn into the current debate.

Critics of the study then asked that the tort data be specifically separated from the contract, real property rights, and small claims cases.

Now although definitions of what qualifies as a, quote, unquote, "explosion" may vary, I think most would agree, that any increase must significantly exceed population increases.

Others may set more stringent requirements. For example, a 25- or 50-percent increase. That is to say, something large enough to cause a, quote, unquote, "crisis."

When we specifically studied tort data between the years 1978 and 1984, we found that there was an increase of 9 percent of all tort filings, but the population increased 8 percent, and therefore, in our estimation that does not qualify as an explosion.

With that finding, critics then suggested that there would be a significant difference between auto torts and nonauto torts, with nonauto torts including product liability, medical malpractice.

A recent look at this data between the years 1984 and 1985 indicate that there is no significant difference in the number of filings between auto and nonauto torts over time.

In fact in two States, Arizona and Washington, in their general jurisdiction courts, auto torts actually increased at a rate significantly greater than nonauto torts.

With that finding, critics suggested that the States that were studied in the tort study were not representative. All States that reported complete and comparable data during the time period indicated were included in this study. Those States included California, Colorado, Florida, Maine, New York, Tennessee, Ohio, and several others.

I will let you judge for yourself whether or not you think that that sampling of States is representative. With that finding, critics said the data were not current.

At the National Center we are currently collecting the 1985 data which is the most recent available from the State administrative offices of the courts, and preliminary examination of that 1985 data again do not indicate any level of a litigation explosion.

With that finding, critics have said, "But we need product liability data only." And here is where the problem starts. This is the first indication of what we do not know in this area.

Due to the recency of this issue in the State courts in particular, we simply have not had the time to try and gather this information in a systematic sort of way.

Not one State reported product liability data to the National Center for State Courts in the year 1984, although we are now trying to collect as much of that data as possible for the current study of 1985.

In addition we do not know the total number of disputes. We do not know the total number of outcomes, that is to say, pre-filing settlements, and we do not know changes in case complexity.

We do not know the percentage of the time that the plaintiff wins on a national basis. We do not have detailed information on the various tort types. We do not have information as to the types of damages from a nationwide perspective.

We do not have comparable and complete national data on a medium-sized jury and bench awards in this area. We do not have information on actual payouts, that is to say, what the trial judge does with the jury's verdict as well as what happens to those cases on appeal. And we do not have any information on structured settlements versus lump-sum payouts.

I would like to conclude, and I suppose it is appropriate, given that the first witness testified that we may not need more research; I would like to conclude that we need more research.

What we do not know far outweighs what we know. Thank you.

[The statement follows:]

Statement of Robert T. Roper, Director
Court Statistics and Information Management Project
of the
National Center for State Courts

Mr. Chairman and Members of the Committee. I am Robert Roper, Director of the Court Statistics and Information Management Project of the National Center for State Courts. The National Center for State Courts is a nonprofit organization dedicated to modernizing court operations and improving justice at the state and local levels throughout the country. To accomplish its basic purpose--helping courts better serve both litigants and the general public--the National Center is active in four primary areas: research on courts and court-related topics; education and training programs for court personnel; direct assistance to state and local courts; and information exchange. The primary sources of financial support for the National Center are: state assessments, state and local grants, federal grants, private contributions, and seminar and conference fees.

We appreciate the opportunity to explain more completely our recent study entitled, "A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981, and 1984." As is the case with most statistical reports, this report has been used and misused. We would like to take this opportunity to delineate specifically what the report does, and does not say.

First, the reader should consider what the report does not say. The report makes no comment on: the disposition of disputes before they reach the courts; the substantive law of product liability; the number of cases in state courts relevant to specific casetypes reported in the general tort area (e.g., medical malpractice, product liability); settlements in civil cases; the size of awards in civil cases; cases filed in the federal courts (although 95-98% of all civil cases are filed in the state courts); changes in the complexity of civil cases; and any continuation of the trend in 1985-86. The report does conclude, however, that there is no evidence to support any assumption of a steep, continuing upward national trend in tort filings in state trial courts.

Despite the caveats outlined above, however, Chief Justice Carrico of

Virginia, testifying before the Senate Consumer Subcommittee of the Committee on Commerce, Science and Transportation on behalf of the Conference of Chief Justices stated that, "...the study is the most authoritative available and the burden of proof has shifted to those who now would claim the existence of the [litigation] explosion..." Furthermore, testimony by the Institute for Civil Justice of the Rand Corporation before the Subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee of Congress, further evidences the lack of any "explosion" in the number of tort filings between 1981-1984. Additional support for this finding is available from Gerald T. Wetherington, Chief Judge of the Eleventh Judicial Circuit of Florida (Dade County, Florida).

The National Center report was originally designed to test a general propensity to sue. The casetypes that specifically addressed this issue are tort, contract, real property rights, and small claims. The general finding is that, "A careful examination of available data relating to tort, contract, real property rights, and small claims cases from a representative group of state courts provides no evidence to support any allegation of a steep, continuing upward trend of the referenced civil case filings in the state trial courts during the 1981-84 time period."

There are some state courts that have experienced significant increases in the filings of the casetypes described, but those are courts in states that have also experienced significant increases in their total populations. Thus, changes in the number of these filings for 1981-1984 are not attributable to an increase in the propensity of Americans to sue, but rather to an increase in the number of Americans.

The findings, however, can be extended one further step. Not only is the evidence missing to indicate a significant national increase in filings above the increase in population, but in a number of state courts, selected civil filings have decreased between the period 1981-1984.

It may be that there was a litigation explosion that peaked around 1981. The evidence tends to support that observation. There were significant increases in filings between 1978-81, far exceeding the increases in population. In fact, the increases were so large during 1978-81, that despite the decreases that occurred during 1981-84, the percentage changes from 1978-84 are still showing moderate increases.

Torts are of particular interest in this matter. The increase in tort case filings between 1978-81 was only 2%, while the population for those states grew 4% during the same time period. Between 1981 and 1984 the population grew another 4% while tort filings increased by 7%. For the entire period 1978-84 total tort filings increased 9%, however, the population also increased by 8%. Clearly, this increase does not qualify as an "explosion."

The "litigation explosion" has several dimensions, and the perception of a continuing upward trend of civil lawsuits in the state courts could result from confusing the number of new filings with the other dimensions of the problem: (1) intensive media focus on the enormous "size of the awards" in a few selected and well publicized civil cases; and (2) increased workload in the courts, not caused by an increase in the rate of civil lawsuits, but by "more complex cases," and perhaps fewer resources available to the courts to handle expected increases in filings which results in larger backlogs.

Additionally, there are a variety of potential explanations for the leveling off or decreases in civil suits during that time period: (1) The public's attitude toward lawsuits may be changing. People may be deterred from filing in court as a result of concerns about costs and civil litigation that is likely to take years--except for the more serious cases, it may not be worth the effort; (2) For years people speculated that greater numbers of laws resulted in increased litigation to interpret those laws--this testing of new legislation and judicial rules may have run its course; and (3) Finally, and perhaps most importantly, insurance companies and attorneys may be increasing their efficiency in settling conflict before cases reach the courts.

The existence of any litigation explosions has been cyclical, and there is no evidence to support the notion of a continuing nationwide increase in lawsuits in the state trial courts between 1981-84.

What is absolutely clear from the current debate is the lack of information on the topic of the "litigation explosion." Appendix A outlines some of this problem's dimensions: the number of total disputes (most of which may never reach court); the number of court filings; the types of court outcomes; the complexity of cases; and the resources available to courts. Reliable, comparable, and national data that address all of these dimensions are simply unavailable. For example, we are unsure of: how many cases are settled, withdrawn or defaulted prior to a court filing; the size of pre-filing settlements; the distribution of types of torts in the state courts; the percent of the time the plaintiff actually wins; the amount of damages that are compensatory or punitive; the median size of jury awards; the reduction of jury awards by judges; what happens to jury awards on appeal; how much of the awards are actually paid in lump sums vs. structured settlements; and the impact of complex litigation and available resources on court workload.

In the absence of this information, one cannot make an educated guess about the existence of a "litigation explosion." We need more data to address this problem, and ought to be cautious about making major changes in the legal system based on anecdote and the existing information. After studying this issue, the Iowa and Alabama state legislatures concluded that more research is needed. They appropriated money to further study these questions.

Late this fall, the National Center for State Courts will publish a complete study of these problems. The study will: update the findings of the Preliminary Report with 1985 data; summarize all of the research that is currently available on the topic; develop a typology for organizing the dimensions of this problem; and outline research methodologies for addressing these unanswered questions.

Again, we thank you for the opportunity to express views on this topic.

Appendix A

DIMENSIONS OF A CIVIL "LITIGATION EXPLOSION"

- NUMBER OF DISPUTES
  - Number of disputes involving insurance claims
  - Number of settled, defaulted, and withdrawn cases
  - Size of pre-filing settlements

- NUMBER OF COURT FILINGS
  - Number by casetypes per capita over time (tort, contract, real property rights)
  - Number by tort casetypes per capita over time (medical malpractice, product liability, auto tort, other non-auto tort)

- COURT OUTCOMES
  - Dismissals
  - Verdicts
    - Who are the decision-makers (juries/judges)?
    - Percent of the time plaintiff wins?
    - Whether damages are compensatory or punitive?
  - Size of awards
    - Actual size of the jury awards?
    - Impact of the judge on jury awards?
    - What happens to jury awards on appeal?
    - How much of the awards are collected or paid?

- COMPLEXITY OF CASES
  - Consumes more court resources
  - Takes longer

- RESOURCES AVAILABLE TO COURTS
  - Judicial personnel
  - Support services and personnel
  - Equipment

Mr. **Herman**. Thank you, Mr. Roper. I might concur with your conclusion, at least to the extent that there seems to be some disparity between the statistics that you present in your analysis of litigation before State courts and the information that has been provided to us by the Administrative Office of the Courts on Federal filings.

Clearly, the statistics that we have been presented with from 1961 to 1985 shows annual increases in total tort filings, total personal injury filings, consistently, with one exception between 1972 and 1983. Consistent almost to the same extent that Mr. Hermann indicated, that there seems to be a general trend of a 15 percent annual increase in the size of jury verdicts.

The trend is unmistakable. And similarly, you had suggested that there is limited evidence that you can effectively segregate automobile tort cases from others, and that if you do so, it does not suggest much of a difference in the growth of cases filed.

The evidence that Senator McConnell brought out during his opening remarks would contradict that. That evidence indicates that there has been a twofold increase in total personal injury filings from 1961 through 1985, but if you delete from those figures motor vehicle cases, the increase is threefold, and that the absolute decrease in cases of motor vehicle torts filed between 1969 and 1985 has gone down by about a third. So I am not sure what the differences are between Federal court and State court findings, but there does seem to be some distinctions.

Mr. **Roper**. Yes. There appear to be some distinctions between what is happening in the Federal courts and what is happening in the State courts.

However, I would like to remind you that between 95 and 97 percent of all civil litigation in this country takes place in the State courts, and the large percentages that Senator McConnell referenced during his opening remarks may largely be a function of the relatively small numbers of cases.

I think in the medical malpractice field he was citing from 300, to a significantly larger figure than 300, representing a 200-percent increase.

Well, we are still talking about very small figures than what we are talking about in the State courts, as far as actual numbers of filings, and we need to keep that in mind.

California, Texas, Hawaii, are three of the States, that we found no difference between auto tort and nonauto torts in the State courts.

New York, in fact both went down from 1984 to 1985. Maryland, both went down from 1984 to 1985, and in a couple of other States we have mixed filings. But I would just like to reiterate the need for more information. We simply do not know.

Mr. **Herman**. Let me throw out one additional question. You referenced, and so I assume you are familiar with the studies conducted by the Institute For Civil Justice in Cook County, IL and San Francisco.

The analysts at Rand conclude that there is a dual trend in liability in this country: That for the common garden variety tort cases there seems to be some stabilization. But in areas such as product liability, medical malpractice and municipal liability, there are dramatic increases both in the number of cases filed and in the magnitude of awards to plaintiffs.

Could you comment on that.

Mr. **Roper**. Well, I have two comments. First of all, I certainly would not want to generalize to the entire country based upon what happens in Cook County, IL.

We try to gather as much information as we get from every State court that collects and reports the data.

Second, I am not sure if the Institute for Civil Justice of the Rand Corp. will be testifying here during tomorrow's hearings, but I know I have heard information directly from Rand, that they are about to release a study this fall that is going to support the general finding of the National Center for State Courts, that there does not appear to be a litigation explosion.

Mr. **Herman**. Thank you very much. With the one statement, that some of the members of this committee may be submitting additional written questions, this committee stands in recess.

We will reconvene tomorrow morning at 9 o'clock to proceed with these hearings. Thank you.

[Whereupon, at 1:06 p.m., the committee was adjourned, subject to the call of the Chair.]

PRODUCT LIABILITY REFORM ACT—S. 2760

WEDNESDAY, SEPTEMBER 10, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman) presiding.

Present: Senators Broyhill, McConnell, Heflin, Grassley, Simon, and Specter.

Staff present: Mike Regan, counsel; Lawrence R. Herman, chief counsel (Subcommittee on Courts); and Christopher Dunn, minority counsel.

OPENING STATEMENT OF SENATOR JAMES T. BROYHILL

Senator **BROYHILL** [presiding]. The committee will come to order.

The committee is holding a hearing on S. 2760. We are delighted to hear from the distinguished Senator from Missouri, Senator Danforth, who is the chairman of the Commerce, Science, and Transportation Committee and whose committee has reported S. 2760 and has original jurisdiction over this legislation. We are delighted to have you come and testify this morning. We will be delighted to have your testimony inserted in the record and you may summarize.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

The Senate Judiciary Committee today considers S. 2760, the Product Liability Reform Act, a bill drafted by the Senate Commerce Committee which provides for a uniform Federal product liability law. This legislation represents months of efforts by the Commerce Committee to write a consensus bill which could be considered by the full Senate. Despite the good faith efforts of members of both the Commerce and Judiciary Committees, we were unable to obtain a sequential referral of S. 2760. Regardless, the members of the Judiciary Committee believe it is appropriate that the committee carefully review legislation which affects standards of liability and civil procedure in tort actions. Therefore, the committee is holding these two days of hearings, with an impressive witness list, to examine S. 2760 in detail.

Tort reform legislation—the need for it and, if there is a need, the exact shape it should take—has been a hotly debated topic of late. In the last decade, we have witnessed an erosion of the traditional concepts of fault-based liability, which have been gradually replaced by no-fault and strict liability theories. These developments have significantly increased the number of lawsuits that are clogging our court system and have contributed to the dramatic increase in the number and size of monetary awards.

While the underlying causes of these developments may be debatable, no one disputes the dramatic impact that expanded tort liability has on our lives. Liability, or the fear of liability, affects the price and types of products we buy, the manner in which we conduct business, the price and availability of insurance, the permissible uses of our land, the health care we receive, and even the way we care for our children.

This committee has examined liability questions in earlier Congresses including the personal liability dilemma facing certain Government employees and the indemnification and the reduction of liability of Government contractors. More recently, this committee has examined the lack of availability of insurance for municipalities and the underlying liability schemes of the Superfund Program advanced by the administration. The issues are complex and broad and deserve special attention.

We have some excellent witnesses over the two days of hearings who will help this committee focus squarely on the key issues raised in the Product Liability Reform Act. I look forward to receiving and reviewing your testimony.

STATEMENT OF HON. JOHN DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator **Danforth**. Thank you, Mr. Chairman. I am pleased to be here. I am delighted that the Judiciary Committee is addressing the question of product liability. The Commerce Committee has addressed this now for a number of years. We have attempted to mark up at least a couple of bills. We finally reported out S. 2760 a couple of months ago. I have been asked a number of times this morning since I came into the room what the prospect for action is. I know that Senator Dole would like to bring this up on the floor. There is at least some chance that we will not be able to get the bill enacted this year. And should it go over until next year, Mr. Chairman, I would hope that you would be a member of the Commerce Committee at that time and then you would help participate in the activity.

Mr. Chairman, my understanding of the hearing yesterday in the Judiciary Committee is that one or two members of the Judiciary Committee expressed some puzzlement as to why the Congress should get into this business of product liability reform. They felt that maybe this should be a matter that is left to the States. Even in S. 2760, many questions of tort reform are left to the States.

I think the answer to the question as to why we should refrain from doing nothing, why we should be addressing the question at all is that if you ask anybody who has gone through this system, and if you ask people in business what are the problems you see, they will bend your ear forever.

A couple of months ago there was a meeting here in Washington of the small business people, a White House Conference on Small Business. The No. 1 concern that they expressed was about product liability. They are demanding that something be done, that Congress act.

There is evidence that the costs of litigation, including attorneys fees, now run between $15 and $19 billion a year. If that is the case, then the amount that we are paying to the civil justice system, the amount that we are paying for lawyers in product liability cases is exceeding what plaintiffs get.

Now, some people say, well, if we want to get into this area, if there is going to be any kind of restraint on recovery, why, that is not compassionate, it is not compassionate; if somebody has undergone a serious injury to in any way place any restriction on what the recovery can be.

Mr. Chairman, I would suggest that the present system is not very compassionate. I don't think it is very compassionate if somebody who is seriously injured can wait 5 years before getting any relief at all. I do not think that it is very compassionate for every incentive in the system to be for delay. I do not think that it is very compassionate for the costs of litigation and for the costs of this unworkable system to be greater than the compensation provided to those injured by defective products, and for the costs which we have now to be passed on to the consumer in higher prices.

I do not think it is compassionate. I think it is a scandal and I think where this kind of scandal exists in our country, Congress should be attentive to it, and if it is possible Congress should get to work on it and should reform it.

Mr. Chairman, the bill that was reported by the Commerce Committee is a comprehensive piece of legislation. It is also a very controversial piece of legislation that was finally reported out of the committee by a vote of 9 to 7.

We could have had a bigger vote. We could have had a bigger margin to report that bill out of committee, but I did not want to report out a blank. I did not want to report out a bill that just pretends to address the question of product liability. It seemed to me that if we are going to take action it should be more than just putting out press releases and claiming that we have taken action. It should be something that is effective.

It has seemed to us in the Commerce Committee, at least to a majority of us on the Commerce Committee, that any meaningful system of product liability reform must include some mechanism or some system of incentives to settle cases expeditiously short of full-scale litigation.

The scandal is that the cases drag on forever. The scandal is that the more serious the injury, the longer the case is liable to drag out and the more the plaintiff is going to be inclined to settle for almost anything because the plaintiff's expenses are high and he must meet those expenses. So the whole theory of the bill that we reported out, at least the central theory of the bill that we reported out, is to develop a system of incentives so that both plaintiffs and defendants feel that it is worth their while to settle litigation, to settle claims short of full-scale litigation, short of going through the whole court system.

And that is the reason we develop a system of caps in the Commerce Committee bill. What we said is that if the defendant refuses a settlement offer more favorable than the judgment the defendant should pay the attorney fees for the plaintiff. If the defendant makes an offer of settlement and the offer is for the full economic damages of the plaintiffs, plus a limited amount for pain and suffering, then there should be some cap on the exposure of the defendant to these wild verdicts that could otherwise go against the defendant.

I do not know of any other incentive system that makes sense other than an economic incentive system. I do not know of any way to encourage plaintiffs and defendants to settle short of full-blown litigation, unless there is some economic motive for them to do that. That was the whole thrust of this legislation.

We debated various alternatives to a cap system. We had various alternatives drafted. Most of them proved highly complicated. People could not understand them. They were controversial, and finally we turned to caps. I recall at one time, I made a luncheon speech on the subject of product liability, and at the end of the speech, at the elevator, one of the people present said if you do not have caps you do not have anything in the bill. So we put caps in this bill and I want to make it clear, Mr. Chairman, that the point of putting caps in the bill was not to be hard-hearted or mean-spirited, but, rather, to get these cases disposed of, get these cases settled.

I have always believed that there should be a community of interest between consumers and between manufacturers for meaningful product liability reform. I know that the trial lawyers have an interest in the existing system. Of course they do. You know, if they are getting 50 percent of the total amount that is paid out just for keeping the matter alive and keeping the ball in play forever, of course they have a vested interest in the status quo.

But it seems to me for the rest of the country, for consumers, for manufacturers, for people who have been injured, there should be a common interest for making sure that reasonable recovery for actual losses is paid expeditiously, and that is the point of the bill that the Commerce Committee reported.

Just one other point, Mr. Chairman: I have repeatedly throughout the last year and a half said that nothing is etched in stone as far as I am concerned. I am very flexible in entertaining other proposals, particularly to provide incentives for settlement. I have communicated with various people, including Senator Inouye and Senator Stevens on this matter. I have asked anybody who was interested to come forth with any suggestion for incentives for settlement that they might have.

There is nothing inflexible as far as I am concerned about the Commerce Committee's position on this matter. However, having said that, I have never seen a meaningful, workable incentive system for settlement that did not contain caps. So if anybody on this committee has a better idea, great, I am delighted to hear it.

Thank you very much for allowing me to testify.

Senator BROYHILL. Thank you very much for your testimony and, as one who has worked very hard over the years to formulate legislation to remedy the problems that you have outlined, I want to commend you for the good work that you have done. The bill is not perfect, but, at least, it is a considerable giant step forward from where we have been. We have been debating this issue too long, and it is time to start the legislative wheels rolling.

At this time I will recognize the Senator from Kentucky.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator MCCONNELL. Thank you, Mr. Chairman.

Senator Danforth, I want to add my commendation to that of Senator Broyhill for all of your work on this issue over the years. I might share with you a disturbing observation made by our colleagues, Senator Biden and Senator Metzenbaum, at the hearing yesterday that this kind of legislation was going nowhere this year, and they said that with great certainty, so I suspect that whatever bill is brought to the floor is going to encounter considerable difficulty.

Senator Danforth, there have been a number of criticisms, as you know, of the expedited settlement provision of S. 2760 from both supporters and opponents of product liability reform. You outlined the section for us, but I am wondering if—and I think you have already answered this—whether you might be open to some modifications of that section.

Senator **Danforth**. Absolutely, and I have attempted to make this clear all along the way, if anybody has a better idea, let us hear it. I would say, though, that over the last 2 years or so the Commerce Committee has been addressing this, we have run through a variety of versions and we have discussed this matter at great length with law professors, with people we think have great expertise. We have not, frankly, seen anything better than some kind of cap.

I think as far as the defendants are concerned, what they want to do is to try to get some predictability on their exposure, and that is the No. 1 interest they have. What we have attempted to do is to say, all right, if you want predictability on your exposure, you have to ante up fast.

Senator **McConnell**. You are familiar, I think, with my view that the most appropriate approach to this problem is comprehensive tort reform at the Federal level. That is viewed by some as the most violative of notions of federalism. Nevertheless, it is my own view that this is the only way to bring some true predictability to this system across the board and do something for the mayors, the physicians, the Boys Scouts, the day care centers and others, all of whom would not be touched by any kind of product liability bill.

I am wondering what your view would be about some kind of comprehensive tort reform amendment should your bill be called up by the leader, an amendment in the nature of a substitute, what would your position be on that?

Senator **Danforth**. Well, I would have to look at the amendment. Senator Kasten, who I see is here now, has really been the father and the grandfather and great-uncle and godfather and everything else of the whole issue of product liability reform. A couple of years ago, I guess, when we marked up S. 100, that really was a fairly comprehensive idea of at least product liability reform, and it attempted to modify the whole tort system.

I voted for it. I think though that we just could not get the votes for it, and so what we have attempted to do in our committee is to take a much more limited view of things and not try to get into the business of saying, well, liability should be based only on fault, for example. We leave that to the States.

I also think that once we get into the business of substantive tort reform, we have set up just a new starting point for the various fifty jurisdictions to begin developing their own common law on a new base, so I am not sure that we are that much farther along.

With respect to broadening the concept of settlement incentives to apply beyond product manufacturers to other areas as well, I think that that would be something that would be very interesting to pursue. We are much more restricted, of course, in the Commerce Committee, but I think that would be something that would be worth considering.

Senator **McConnell**. Thank you.

Senator **Danforth**. Could I just say one thing, Senator McConnell. You said that certain Senators said that this idea is going nowhere. Of course, we have heard that with respect to a lot of things that we attempt to do in Congress. You know, sometimes around here you wonder what is going anywhere. I guess we can pass a sense of the Senate resolution condemning terrorism and maybe that is about the best we can do around here.

But I would hope that sometimes at least in the Congress of the United States, instead of making speeches about what concerns the American people, we could act effectively and this is one area where I think we could.

Senator **McConnell**. I could not agree more. That is not my view. I was——

Senator **Danforth**. I know. You tossed the ball my way and I wanted to take a swing at it.

Senator **McConnell**. I am glad you did not pass up that opportunity. Thank you.

Senator **Danforth**. Thank you.

[The prepared statement of Senator McConnell follows:]

PREPARED STATEMENT OF SENATOR MITCH McCONNELL

Today, the Committee on the Judiciary continues with its second day of hearings on S. 2760, the Product Liability Reform Act.

Yesterday, one of the issues before us was whether the insurance component of the liability crisis was beginning to abate. This morning, we will have an insurance panel which I hope might clarify this matter. However, I have a clipping in my hand from the Lexington Herald Leader which suggests that the answer to this question is a definite no. The lead paragraph reads: "The Harlan County cities of Cumberland, Benham and Lynch were without a licensed emergency ambulance service yesterday after its liability insurance policy was canceled."

The Kentucky General Assembly has created an insurance and liability task force to investigate the causes of the availability and affordability crisis in my State. I believe that we will find their findings and conclusions useful in our own deliberations over this issue.

What is becoming less and less useful, in my opinion, is the bickering, finger pointing and accusations that have plagued this debate. The time has come for action. The causes of the liability crisis are many. The only innocent bystanders have been the American people who, ultimately, pick up the tab.

Tort reform is not a sinister conspiracy to make the world safe for reckless and irresponsible manufacturers. It is not an endeavor to absolve or bail out the insurance industry. And it is certainly not an open invitation to exact vengence and venom upon this Nation's trial lawyers. It is an endeavor to bring the scales of justice back into balance and to resurrect our decaying civil justice system.

I would submit that the responsibility for carrying out this task falls upon the legislative branch. It is our responsibility to determine public policy. That is what we are elected to do. So let us get on with the business at hand.

We have four panels of witnesses before us this morning, as well as several Members of the Senate who have requested an opportunity to testify. It is my hope that the testimony we hear this morning will constructively assist us in formulating an effective and meaningful piece of legislation.

AMERICAN BUSINESS CONFERENCE STATEMENT ON LIABILITY REFORM

The members of the American Business Conference believe that the increased costs and limited availability of all forms of liability insurance have become barriers to economic growth and competitiveness. A recent poll of the ABC membership revealed that 64.7 percent feel that the liability crisis has restricted growth in their industries by making people less willing to take risks, innovate, or expand into new product lines. In an indirect but very real way, our nation's liability problems are costing us in jobs.

The liability problem extends beyond product liability, and federal reform of other forms of liability is warranted in addition to product liability reform. The ABC poll found that 47 percent of the ABC CEO's had difficulty finding product liabilty insurance; 60 percent had difficulty finding directors and officers' insurance; 51 percent had difficulty finding general liability insurance. Over 86 percent found that general liability insurance could only be found at vastly increased rates.

The ABC believes that America needs broad-based federal standards for all major forms of liability. While the bill reported by the Commerce Committee includes some important reforms, we believe it does not go far enough. We favor the broader approach espoused by Senator Mitch McConnell. We feel the four most important elements of liability reform are:

1. The elimination of joint and several liability for both economic and noneconomic damages;
2. Limitations on punitive damages;
3. Reasonable statutes of repose and limitations;
4. Alternative mechanisms for dispute resolution.

Senator BROYHILL. One final question from this Senator. What can you tell us with respect to the depth and breadth of support for this legislation within the business community?

Senator DANFORTH. Well, Mr. Chairman, it really is amazing, in my opinion, how do you gauge support for something. It is in part letters and phone calls, it is in part people who just buttonhole you in airports, and it is in part the kind of turnout you get back home when you are addressing things.

I can think of a couple of meetings within the last few months that I had back in Missouri, and unfortunately they were both breakfast meetings. You know, it is very hard for me to get myself in gear for a fiery presentation in a windowless room of people at 7:30 in the morning on the question of product liability.

They were in both cases overflowing audiences of the group that sponsored the meeting. In both cases they were audiences that far exceeded anything that they had previously had.

I do not think that those people were there to hear, you know, some early morning chatter from a politician. I think that they were there because they were totally concerned about a problem that they perceive as being very serious. I am sure that in your hearings already you have heard horror stories about people who cannot buy insurance or whose insurance costs have tripled in a year even though no claims have been filed.

There is total unpredictability in this area right now and you cannot buy insurance for a reasonable price if the insurance carrier does not know what is happening, if the field is just so open to wild change that there is no predictability at all. And the whole concept of a cap is to provide a mechanism for obtaining certainty in exchange for an early payment.

You know, when I practiced law, some of the cases—it was in the late 1960's that I last practiced law in private practice and I think some of the cases I was working on in the late 1960's are still going on, because the name of the game for lawyers, defense lawyers in particular, is to just keep that ball in play, you know, just keep it going forever and ever.

Some of the most successful lawyers are the ones who are most fertile in writing interrogetories. You can just keep this thing going forever, and it is great for lawyers. I mean they get to send out their bills and everybody wants to go to law school, and it is wonderful for the lawyers, but I do not think it is so wonderful for everybody else. And my hope is that the enthusiasm that has been shown by manufacturers, and I think increasingly by consumers alike, will continue to spread and that the pressure will continue to build until Congress does what is responsible.

Senator BROYHILL. One final question, and this needs to be asked because your committee would have partial jurisdiction over this. The question has been raised in the hearing thus far—that the insurance industry is to blame for this problem and that there is need for more regulation of it. Did you look into these allegations and did you come to any conclusion with respect to the need for more regulation of the insurance industry?

Senator DANFORTH. We had very extensive hearings in addition to about 6 days of markup in the Commerce Committee on the whole problem of insurance. We had a number of expert witnesses in something as controversial and complex as this. Of course, there is a variety of opinion on it.

I think that the evidence overwhelmingly is that the insurance industry is a competitive industry. That is not to say that it has not made mistakes. It has made mistakes. It has gotten itself into a hole in the past by its underwriting practices. But I am convinced that the No. 1 problem is not some temporary blip in underwriting practices and that it is not lack of competition in insurance.

I think the problem is that nobody knows what to charge, that there is just total unpredictability with respect to exposure. So my hope is that Congress would not repeal the McCarran-Ferguson Act. My hope is that Congress would not decide that we want to get into this business of regulating insurance, but that, instead, we would try to provide some mechanism to provide incentives for settlement in the court system.

Senator BROYHILL. Thank you very much for your testimony. We appreciate your coming and we appreciate your hard work on this issue.

Senator DANFORTH. Thank you, Mr. Chairman.

Senator BROYHILL. The committee is glad to welcome at this time the Senator from Wisconsin who has been a leader in the effort to achieve some reform in the area of product liability, and who has introduced legislation along these lines in several Congresses. We are delighted to welcome Senator Kasten.

STATEMENT OF HON. ROBERT W. KASTEN JR., A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KASTEN. Mr. Chairman, first of all, thank you very much for that introduction, but, more importantly, for having these hearings. I greatly appreciate the opportunity to testify today in support of S. 2760, the Product Liability Reform Act. I am in complete agreement with the President, Majority Leader Dole, and colleagues on both sides of the aisle—Republicans and Democrats—who believe that action on the product liability legislation is absolutely essential in this Congress.

Just 3 weeks ago, the delegates to the White House Conference on Small Business ranked the liability crisis as the No. 1 problem for small business today. The delegates, in an unprecedented action, passed a specific resolution calling on Congress to pass the legislation under consideration here today.

Only 2 weeks ago, the National Governors' Association overturned a longstanding policy against Federal preemption of product liability laws and voted to support a Federal resolution to the product liability crisis.

Mr. Chairman, our product liability system has been in need of reform for many, many years, and no one knows this better than you. You introduced the first Comprehensive Product Liability Reform Act in the House of Representatives a full three Congresses ago, and we have been working together on this issue, but I truly believe that we are fortunate now that your expertise will be available to the U.S. Senate as we debate this bill on the floor, whether it is the 20th of September or whenever it is going to be coming up, because I think that you will be playing a key role. There is no one who has been working harder on this legislation than you have.

When our legislation was introduced, you and I at roughly the same time in the House and the Senate, the American people I think were at least partly unaware of how severe the product liability crisis had become. Today, however, because of the overall liability crisis, the lives of everyone in our society have been adversely affected by our tort system. All over the country, the liability crisis is changing the way we live.

Will County, IL, closed its forest preserves while it searches for a new liability insurance policy. Blue Lake, CA, decided to shut its skating rink, parks, and tennis courts. Eau Claire County, WI, has canceled their Memorial Day parade and the annual Fourth of July fireworks. Thousands of cities and towns are being forced to go bare, to go without insurance because they cannot afford liability insurance.

Small businesses across the country are shutting down because they cannot get liability insurance coverage. Day-care centers are facing astronomical increases in their insurance rates. Manufacturers of everything, from football helmets to child-safety seats, are halting production because of high liability insurance costs.

And every American pays, every single person pays—doctors and their patients, ski-slope operators and their patrons, municipal governments and their taxpayers, and consumers of almost every product that you can find on the shelves of any major department store today. Everyone pays, but, most importantly, society pays a price as well.

A few years ago there were four U.S. companies manufacturing a measles vaccine. Today, because of the high cost of liability insurance, there is just one left.

A Milwaukee company has designed a new safety braking device for lawnmowers, but they cannot afford to put it on the market. If they do, their liability insurance—it is a small company—would go from $18,000 a year to $200,000 a year because they would go out and market this new safety device. They have obviously decided that they cannot afford to do it.

I know that Senator McConnell of this committee has been searching for ways to address the broader liability crisis and I applaud his leadership in this direction. Whether or not a Federal solution to the broader tort crisis could be fashioned, which is consistent with the principles of federalism, is a question which I have not yet answered, but clearly because of its impact on interstate commerce, there is an overwhelming consensus for Federal reform of our product liability system, and I applaud the efforts that Senator McConnell has been making.

Today's system, the current system, is a national disgrace. It is the No. 1 problem for consumers in America. The costs of this system, the exorbitant costs of this system, where more money goes to attorneys than to injured victims, as the Senator from Missouri, Senator Danforth, pointed out, are passed along—those costs are passed along to the consumer in the form of higher prices for American goods.

We have reached the point where well over a third of the cost of an ordinary stepladder, for example, goes solely for liability insurance. The American people are fed up with this hidden attorney's fee tax on every product that they buy.

Most of S. 2760 is the product of an overwhelming bipartisan consensus on the product liability issue. The core proposal, the basic proposal passed on a 16-to-1 vote in our committee, and I think that is very important when we talk about the chances for passage, when we talk about where this legislation is going; 16-to-1 was the vote in the committee on the basic core proposal of S. 2760. Only one member of the committee still believes that a Federal solution to the product liability explosion is inappropriate.

We achieved this consensus and that consensus included a number of complicated difficult issues. The statute of repose was part of the consensus. The statute of limitations, the uniform fault standard, subrogation lien elimination, penalties for attorneys who bring frivolous suits and cause undue delays, punitive damage clarification, and provisions relating to admissible evidence and to proper situs for claims arising in foreign countries—all of this was part of our overall 16-to-1 consensus.

I believe that our legislation is a good sound bill which would go a long way toward alleviating the liability crisis. However, I believe that a return to the concept of fault in our tort law is essential. I think it is absolutely essential to restore fairness and also to restore predictability. We need that fault-based standard.

Recent cases have held manufacturers liable when they were totally innocent. Several courts have held manufacturers liable for failing to warn about dangers which basically were unknowable at the time. One court held a manufacturer liable where there were no injury to the plaintiff, only a fear of future injury. Other courts have held manufacturers liable for injuries to the plaintiff where the plaintiff has unreasonably altered or—and we are finding this in our testimony and I am sure you are going to see this in yours—where they have either altered or they have misused the manufacturer's products. Such decisions punish the innocent indiscriminately with the guilty and thus make the system useless for discouraging manufacturers from making defective products.

Senator Lugar and I will offer a short and simple amendment to provide two fault-based defenses to protect those who are truly innocent. Our amendment simply provides that a manufacturer should not be liable for harm caused by defects which the manufacturer could not have known about due to scientific, technical, and medical knowledge available at the time.

Further, this amendment provides that a manufacturer should not be liable for harm resulting from the unreasonable alteration or the misuse of the manufacturer's product.

Mr. Chairman, I strongly urge the passage of S. 2760, along with the fault-defense amendment, as well as Senator Pressler's amendment to eliminate joint and several liability. Narrow special interests have delayed a solution to this crisis for too long. Congress should act and I believe we should act this session on this urgent priority of the product liability crisis.

Mr. Chairman, I thank you for the opportunity to appear before you today.

Senator **Broyhill**. I thank you and I want to commend you and the members of the Commerce Committee for your hard work in formulating this legislation.

At this time, I recognize the Senator from Kentucky, Mr. McConnell.

Senator **McConnell**. Thank you, Mr. Chairman.

Senator Kasten, I, too, want to commend you for your leadership in this field over the years. I listened with great interest to your testimony and, as you know, most of the liability crises that you cited at the beginning of your testimony would not be affected in any way by the passage of S. 2760. They would only be affected by the passage of a broader, more comprehensive tort reform bill at the Federal level, which you did make reference to.

I am wondering, even though some have suggested some constitutional problems with it, I wonder if you have any constitutional problems with it, and second, if you could support an amendment in the nature of a substitute offered on the floor to S. 2760 which would broaden tort reform at the Federal level.

Senator **Kasten**. I could and I will. I believe that the work that you are doing is important. I recognize the fact that the product liability reform legislation that we are working on is somewhat limited. It would affect some of the groups that I referred to in different kinds of ways, but it is not as broad as the legislation that you are talking about.

Our legislation is geared toward the Commerce Committee jurisdiction and our legislation is geared toward the most direct difficult problem areas. But I commend you for the work that you are doing. We both have worked closely with the administration. Some of their legislation is of a broader nature than S. 2760. I support that legislation. I introduced the bill.

So I think that we need to work together and I look forward to working with you on a broader piece of legislation as well as concentrating on trying to pass something very close to S. 2760.

Senator **McConnell**. If predictability is the biggest problem—and that is what Senator Danforth made reference to, and yourself as well—what I fear is that if we leave this outside of the product area, if we leave this largely to the discretion of the States, we are going to end up with such a crazy quilt of different actions that, when you look out at the American tort system, particularly if you are in the insurance business on a national basis, you are going to see not much predictability after all is concluded. Some States will act, some States will not act, and those that act will each do something quite different, and it seems to me if ever there was an area that cried out for some kind of national standard, this is it.

It does, as Senator Heflin pointed out yesterday, certainly represented a break with the past in terms of how tort law has been considered in the history of the country, but it seems to me that we need a break with the past in this area and I think we can do it without violating the Constitution.

Senator Kasten. We have had hours upon hours of testimony in the Commerce Committee, and one of the points on which there is wide agreement is that one of the reasons for the high transaction costs—which is what we are trying to reduce—one of the reasons for the high transaction costs is the fact that you have got this patchwork of, in effect, 50 different laws in each different State. Not all of the products that are made in Wisconsin are used in Wisconsin.

So if we could solve this problem in my home State of Wisconsin, we really do not solve the problem even for Wisconsin manufacturers because most of the products that Wisconsin manufacturers manufacture are manufactured outside of the State of Wisconsin. We get ourselves into a crazy kind of a situation where in Wisconsin we do manufacture cranes and other kinds of earth-moving and huge heavy construction equipment. We have got four or five manufacturers of that.

If a crane is backed up into a power line while it is up in Illinois, the crane manufacturer right now is held liable. If the exact same accident happens in another neighboring State of Wisconsin, Minnesota, the operator of the crane or the person who employed and/or trained the crane operator is liable. And New Mexico does it the same way that Minnesota does. I am not going to argue that Minnesota is right and Illinois is wrong, but the point is now you go back and your responsibility is risk management, your job at Harnesvegen or Allis-Chalmers or Caring or whatever crane manufacturer you are in Wisconsin, your job is to try to determine how to cover, how to insure against accidents. You cannot decide whether the accident is going to happen in Minnesota or in Illinois or in New Mexico or in other areas. You do not know which way they are going to go.

So you have got this uncertainty, this lack of predictability and that is one of the major reasons that we have these tremendously high costs of insurance, and these huge costs related to the transaction of product liability litigation. What we have got to do is to have a standard, a broad based standard that will cover the 50 States. It does not mean we are going to get rid of all our product liability problems, but at least we have got a base, a common base of understanding.

I believe that is why the White House Conference on Small Business listed this as the number one problem facing small business. Most small businesses, even though they are small, do not manufacture products for only their State. We are all in interstate commerce.

Senator McConnell. You know, analogous to the situation you just described and one of my concerns about dealing with product liability only is the case in which you have multiple defendants, some of the defendants being sued for alleged defective products and others being sued in the very same case for negligence; and so the jury is confronted with a situation in which there is a limit on the recovery that the plaintiff is entitled to against those defendants who made the defective product, no limit on those defendants in the same case who are alleged to be somewhat negligent, and that was somewhat a part of the action, so you end up with disparate results in the very same case.

I say that not in any way to disparage the efforts of yourself and others who work in the products field, but once again to make the argument that uniform standards across the board that bring some predictability to tort law across America—whether in products or in malpractice or in negligence—it seems to me would get the kind of desired predictability that the business of insurance cries out for. And when I say "the business of insurance," I do not mean the insurance industry.

As you pointed out, whether you retain the risk or whether you go to an insurance company to retain the risk, you still have got a problem. The problem is the spreading of the risk, as you accurately pointed out. It is an enormous problem and I hope we can get some kind of comprehensive solution to it at the Federal level.

Senator **Kasten**. I look forward to working with you.

[The prepared statement of Senator Kasten follows:]

PREPARED STATEMENT OF SENATOR ROBERT W. KASTEN, JR.

Mr. Chairman, members of the committee, I greatly appreciate the opportunity to testify today in support of S. 2760, "The Product Liability Reform Act." I am in complete agreement with President Reagan, Majority Leader Dole, and colleagues on both sides of the aisle who believe that action on product liability legislation is absolutely essential in this Congress.

Since our Consumer Subcommittee began hearings on this issue five and half years ago, the product liability crisis has intensified, and the consensus for Federal action on this issue is now overwhelming.

Just three weeks ago, the delegates to the White House Conference on Small Business ranked the liability crisis as the number one problem for small business today. The delegates, in an unprecedented action, passed a resolution calling on Congress to pass the specific legislation under consideration here today.

Only two weeks ago, the National Governors' Association overturned a long-standing policy against Federal preemption of product liability laws and voted to support a Federal resolution to the product liability crisis.

Mr. Chairman, our product liability system has been in need of reform for many, many years. No one knows this better than the newest member of your committee, Senator Broyhill. Jim Broyhill introduced the First Comprehensive Product Liability Reform Act in the House of Representatives a Full three Congresses ago, and I believe we are truly fortunate that his expertise will be available to this body as we debate this bill on the floor later this month.

When this legislation was introduced, the American people were largely unaware of how severe the product liability crisis had become. Today, however, because of the overall liability crisis, the lives of everyone in our society have been adversely affected by our tort system. All over the country, the liability crisis is changing the way we live.

Will County, Illinois, has closed its forest preserves while it searches for a new liability insurance policy, and Blue Lake, California, has decided to shut its skating rink, parks and tennis court. Eau Claire County, Wisconsin, has canceled their memorial day parade and the annual Fourth of July fireworks display. Thousands of cities and towns are being forced to "go bare"—They cannot afford liability insurance at all.

On the Hawaiian Island of Molokai, Women can't give birth with a doctor in attendance. The five Molokai doctors who once delivered babies have stopped doing so because malpractice insurance would have cost them more than the total of any obstetrical fees they could hope to collect. Hundreds of communities across the United States are not without the services of a single ob-gyn.

Small businesses across the country are shutting down because they can't get liability insurance coverage. Day-care centers are facing astronomical increases in their insurance rates. And manufacturers of everything from football helmets to child-safety seats are halting production because of high liability insurance costs.

And every American pays: Doctors and their patients, ski-slope operators and their patrons, municipal governments and their taxpayers, and consumers of almost every product you can find on the shelves of any major department store today.

Society pays a price as well.

A few years ago there were four U.S. companies manufacturing a measles vaccine. Today, because of the high cost of liability insurance, there is only one.

A Milwaukee company has designed a new safety braking device for lawnmowers, but they can't afford to market it. If they do, their liability insurance will go from $18,000 to $200,000.

Researchers at Stanford University have pioneered the development of a miraculous new artificial skin, which can save the lives of thousands of burn victims in our country each year. Yet they cannot get insurance for their life-saving innovation—no conventional insurance company will touch them because of the risks.

Under the current, crazy system, the liability crisis threatens to deprive us of vaccines, anesthesiology equipment, and hundreds of other products that are, on balance, very good for society as a whole.

Unless changes are made, these products will no longer be available, or they will be available only at a much higher cost, or they will be made only by foreign manufacturers and thousands of American businesses and jobs will be lost. A recent survey in my home State of Wisconsin revealed that a full 10 percent of small businesses in our State must close their doors if something isn't done about the current liability crisis.

That's why I say that the liability crisis is becoming the number one economic issues of our times.

I know that Senator McConnell of this committee has been searching for ways to address the broader liability crisis, and I applaud his leadership in this area. Whether or not a Federal solution to the broader tort crisis can be fashioned which is consistent with the principles of federalism is a question which I have not yet answered. But, clearly, because of its impact on interstate commerce, there is an overwhelming consensus for Federal reform of our product liability system.

The current system is a national disgrace. It is the number one problem for consumers in America. The exorbitant costs of this system, where more money goes to the attorneys than to injured victims, are passed along to the consumer in the form of higher prices for American goods. We have reached the point where over one-third of the cost of an ordinary stepladder goes solely for liability insurance. The American people are fed up with this hidden attorney's fee tax on every product they buy.

In addition to driving up product prices for consumers, the product liability explosion is closing businesses, destroying jobs, crippling American manufacturers' ability to compete with foreigners, discouraging product innovation and improvement, and driving a wide variety of good and beneficial products—from life saving vaccines to football helmets—off the market.

The product liability explosion threatens everyone in America who uses, sells, or manufacturers products.

Most of S. 2760 is the product of an overwhelming, bipartisan consensus on the product liability issue. A core proposal, encompassing most of the key aspects of S. 2760, passed by a 16-1 vote in the Commerce Committee. Only one member of our committee still believes that a Federal solution to the product liability explosion is inappropriate.

We achieved this consensus on such complicated issues as the statute of repose, the statute of limitations, a uniform fault standard for product sellers, subrogation lien elimination, penalties for attorneys who bring frivolous suits and cause undue delays, punitive damage clarification, and provisions relating to admissible evidence and to proper situs for claims arising in foreign countries.

All of these provisions will provide uniformity, clarity, and certainty in the law which will reduce transaction costs and provide a fairer system for product users, sellers, and manufacturers.

I believe that S. 2760 is a good, sound bill which will go a long way toward alleviating the liability crisis. However, I believe a return to the concept of fault in our tort law is absolutely essential to restore fairness and predictability in the law.

Further, our amendment provides that a manufacturer should not be liable for harm resulting from the unreasonable alteration or misuse of the manufacturer's product.

Mr. Chairman, I strongly urge the passage of S. 2760 along with this fault-defense amendment as well as Senator Pressler's amendment to eliminate joint and several liability. Narrow special interests have delayed a solution to this crisis for too long. Congress should act this session on this urgent priority.

Thank you very much.

Senator BROYHILL. The Chair wants to welcome to the committee the chairman of the Judiciary Committee, the most distinguished Senator from South Carolina, Senator Thurmond. Mr. Chairman, this is your gavel and this is your chair and I do not want it to be said that the most junior member is trying to push you out of your chair.

The CHAIRMAN. You have great experience in the House in these matters and I think your advice here would be very helpful to the committee.

Senator BROYHILL. Mr. Chairman, I recognize you at this time.

The CHAIRMAN. I would ask unanimous consent, to save time, that my statement be placed in the record near the beginning of the hearing.

Senator BROYHILL. Thank you, and the statement will be put in the record at the beginning of the hearing.

The CHAIRMAN. You are doing well. You keep on.

Senator BROYHILL. I would like to ask Senator Kasten one question. The administration, in their testimony yesterday, had a number of suggestions with respect to amendments to this legislation. One of their criticisms was that S. 2760 does not insure that fault remain central to product liability law. I am reading from the administration's testimony in which they suggest an amendment, that you will be offering, to add what they term is a fault-based liability provision.

I would like for you to expand on that for a few minutes. What are the deficiencies in S. 2760 that concern you and how would your amendment remedy those deficiencies.

Senator KASTEN. The amendment that I intend to offer will also be offered on behalf of the Senator from Indiana, Senator Lugar, who has been a person who has been interested and active in this.

Basically, we provide that a manufacturer should not be liable for harm caused by defects which the manufacturer could not have known about at the time of the manufacture due to the scientific or the technical or the medical or the expert knowledge available at that time. And that is the same kind of standard, I would point out, that is available to professionals of other areas and I believe that we need to incorporate that basic fault-based standard into the bill. The fault-based standard was not included as part of the legislation that was passed out of the committee.

Senator BROYHILL. Second, I would——

Senator KASTEN. Also, Mr. Chairman, we also in our amendment provide that a manufacturer should not be liable for harm resulting from the change or the alteration, and we say the unreasonable alteration or the misuse of the manufacturer's product. You are going to hear in your testimony numerous examples of misuse of a product, where a product was used for something that it was not intended for, and we believe that a manufacturer should not be liable for harm resulting from the unreasonable alteration or the misuse. So the question is alteration or know or should have known, and reestablishing the fault-based standard.

Senator BROYHILL. I know that the bill is deficient in that respect and does not cover those points. What about the law as it presently exists in the 50 States, the 50 State laws? You are arguing, I assume, that the law is not predictable in the 50 States, that it is not uniform with respect to a fault-based liability.

Senator KASTEN. We spent a lot of time in this particular area, and the law is not predictable. Although when you dig down—and you have a number of legal experts I see coming—you will find that many of these cases have been in fact decided on fault or negligence, but there is growing an area of either absolute or strict liability and there is kind of a gray area in there and I am not a lawyer, but you have several people that can come before you—a growing area of absolute liability, strict liability which is very, very difficult, very, very troublesome, very, very costly, and something that I think that we need to define or at least to put a brake on the system here.

So we need a fault-based standard that is uniform and our amendment, the Kasten-Lugar amendment would establish that fault-based standard and I believe would establish the predictability and the uniformity that we very much need in this area of the law.

Senator BROYHILL. The second matter that I would like for you to briefly address is the question with respect to the caps that are included in this bill. The caps have been subject to criticism and I would like to have your views with respect to the reasons they are there, and whether or not they would be needed if your strict liability provision were added to the bill.

Senator KASTEN. If our fault-based standard were added—the whole discussion of caps is part of Senator Danforth's effort at some kind of an expedited settlement process. I listened to him with great interest because I too believe we have got to be flexible in this expedited settlement process.

The process itself, the caps themselves, whether they need to be changed or they need to be there at all, and whether that expedited settlement process is the best way that we can reach the goals that he and others in the committee had, that is a difficult and a very complicated and a very contentious part of our legislation.

I would, Mr. Chairman, go back to the 16-to-1 vote that we had on the core package here and say that our job as legislators is going to be to work that expedited settlement process along with those caps, to work that out so that that no longer is as contentious as it is today. So I am flexible on that. I was pleased to see that Senator Danforth was flexible on that, and I think that is the area which we are going to have to address in order to develop a broader base of support.

Senator BROYHILL. I thank you very much.

Are there any other questions of Senator Kasten? The Senator from Alabama.

Senator HEFLIN. Senator Kasten, I was on the Commerce Committee for several years until some of the so-called reform occurred, the reforms of Brother Quayle, and I had to leave that committee. I have not seen all of the great advantages of it. I miss being on the Commerce Committee. I missed being there as you all discussed this particular bill.

Senator McConnell mentioned breaking from the past, and I suppose that is probably about as good a definition as any when we look at federalism, breaking from the past. The Attorney General, whom I quoted yesterday, made a statement in a speech before the Conservative Political Action Committee back in January pleading for a return to federalism, and yet he at the first opportunity he changes his approach on it.

It will be interesting to watch some of the great proponents of States rights from an historical viewpoint, and that position on what we might say is the final bastion of federalism and States rights is left. I suppose breaking from the past, that means that the Republican Party has broken from the past relative to its belief in federalism, and so I suppose that term that Senator McConnell used is quite appropriate.

It gives me a lot of concern that there is no longer going to be any area that is exempt from Federal intrusion. In a way, I want to congratulate you on your ingenious parliamentary maneuvering. I was interested—I had not followed the Commerce Committee—but in order to get a 16-to-1 vote on the core bill, which, as I gather, was to leave the State law alone, to not move toward uniformity. Under the bill that came out of the committee, we would let the States have strict liability or have the manufacturers' negligence approach. We will allow that to be done. That is the way the bill came out of committee, as I read the bill, and now we are going to see maneuvering, with which there is certainly nothing wrong, it is legitimate. We will see an effort made on the floor to substitute something that would eliminate that concept and go back to the original proposal of Federal uniformity.

I see that you agreed here today that you would support the McConnell approach which goes beyond product liability and encompasses the entire field of torts. So we will see then, substitutes on the floor, and this is all legitimate, there is nothing wrong with it, and I congratulate you upon your ingenuity.

I do not know whether some of the proponents of the bill are acquainted with it, but they had well get ready because they have a good fight if they are not ready for it because they are going to get rolled. So I will just say there might be a few opponents of it here, and they had better pay a little attention to it.

I am interested in some of the concepts that have been discussed here. If you do on a fault basis, if you go on this Kasten-Lugar amendment on a fault basis, what does it do to the defenses of the State? Will there be uniformity in regard to defenses, or will it be left up to the States as to their defenses?

Senator **Kasten**. My understanding, Senator, would be that we would have a general uniformity across the board and that it would lead toward a general uniformity on the defenses as well. My understanding also—and I want to say, I realize you have been chief justice of your Alabama Supreme Court—I am here as a shoe manufacturer from Fennsville, WI, and I am not a lawyer, and I believe that by establishing the fault-baseds standards that we are working toward, we know or should have known at the time of manufacture as well as the alteration or change—the used machinery dealer is the example that we normally use there, that alters or changes the products or somehow between the machine being taken out of company A and put into company B, one of the safety devices has been lost or changed or somebody has made a change, that the original manufacturer would not still be liable. I believe that we would be establishing uniformity also on the defense side leading toward that.

Senator **Heflin**. Well, as it is right now under this Commerce-passed bill, if a State has strict liability like California, it would allow that under this bill to still be the proven standards there if its defenses would allow that. Alabama does not have strict liability, it has got a manufacturer's liability. It has a defense of contributory negligence which is a pretty strong defense. Some of them have comparative negligence.

I am worried about how this thing is going to turn out and whether or not there will be any uniformity. I gather that it is going to be a mixed breed of whether there is or is not uniformity, I don't know how that language reads—we have not seen it. But there have been so many different times that this bill has been rewritten because of scholarship defectiveness that it worries me that we may have a conglomeration of laws that lead to each State and to each Federal court that might be involved, each with a different interpretation. We might well end up with a situation in which uniformity is not involved but with a real mess where nobody really knows what the law is where.

Has the American Bar Institute ever reviewed any of these bills?

Senator **Kasten**. I have had an opportunity, Senator, to look at your witness list for the hearing today and a number of these people are people who have appeared before us at the Commerce Committee, the full committee level or at the Consumer Subcommittee level. There will be some experts. There have been experts who have testified that in fact by going in the direction that we are going with S. 2760, that we are not going to be able to solve the problems of the transaction costs, et cetera, and that we are going to make it as complicated or it will be as complicated as it is now. But they generally speaking have not been the majority. They are in the minority. Their voice is strong, but their voice is not the consensus as we have heard it develop over the last 4 or 5 years.

Most people believe, and I believe, that by establishing a uniform law and working toward a fault-based standard, that we are in fact going to make it less complicated, not more complicated, that we will reduce the transaction costs and that we will be working toward a less litigious, if you will, area of commerce. In other words, we will not continue to go on and on and on with these court cases and these expensive kinds of them, but there will be people that will suggest, as you and your questions suggested, that really we are not solving the problem, we are making it worse, it is just going to be a different way. But they are in the minority.

There have been scholars who have testified in that direction, but there have been more scholars that have testified and I believe their point has been more broadly accepted, that this kind of legislation, legislation such as S. 2760, would improve the situation, would establish a base—I would say we are breaking from the past possibly, but it is not just the Republican administration. Former Attorney General Griffin Bell supports a Federal product liability standard.

There is a great debate going on in this country, and I think the evidence and more and more information is that we need this Federal standard, although there will be people that will testify as you suggested in your question.

Senator HEFLIN. I would not say that Attorney General Griffin Bell, as a justice of the fifth circuit, followed the concept of federalism too frequently in his opinions in the past. I do not believe that his opinion is a break from the past.

Senator KASTEN. OK.

Senator HEFLIN. I have great admiration for Attorney General Griffin Bell——

Senator KASTEN. I was just trying to point out that there is bipartisan support for this approach.

Senator HEFLIN. Let me ask you one other question that we have argued over a long period of time. Any time you have a real problem and you go beyond the States to pass Federal legislation for the so-called purpose of correcting a problem or defects, in the history of Federal cures, have you ever known of one that did not eventually become extremely more liberal than what was originally passed?

Senator KASTEN. I do not know the answer to that question. In testimony before the committee, we have had a number of people, particularly small business people, who think of this problem in the same way that they would talk about the problems with contracts. And we have had testimony before our committee which said that a contract written in Wisconsin has to be understood and the basic level of understanding has to be understood and agreed to in Alaska and in Florida and in Maine and in Texas, therefore—they have testified before our committee—we established a uniform commercial code. It established a standard, a base.

That does not mean there are not problems in contract law. There are. But we have established a uniform commercial code with a base of understanding State by State, and a number of people who have testified before our committee have said that in effect what we need is a uniform product liability code that is worked roughly the same way that the uniform commercial code has worked in contracts.

Now, whether or not the uniform commercial code or contract law has become more liberal over the years, I truthfully do not know. But I do know that we have got a base, a common base of understanding and as a result of that the transaction costs and the problems related to contracts State by State and nationally have not created the kind of explosive problems that we are now seeing in liability, and particularly in product liability law.

So whether or not it has become more liberal or not over the years, I do not know. But the concept of a uniform law State by State by State I believe has great merit and I believe that is the reason why this legislation has such a strong broad base of support.

Senator HEFLIN. I would not call the UCC, the uniform commercial code, a Federal cure. If there has ever been a shining example of the States getting together, approaching the problems, and showing that they can adopt uniformity, it is in the history of the adoption of the uniform commercial code.

As I read this particular bill, and certainly some of the substitutes, the shining example of article II of the uniform commercial code, which deals with safety, with warranties, with implied warranty, with express warranty, with the statute of limitations pertaining to warranties, would be eliminated to some extent, either by the substitutes or by the bill itself in some aspects, which really is saying that States who did adopt a uniform approach, who were successful, whom we praise and whom you have praised, those efforts somehow or other were wrong.

I think there is a great deal of tort reform needed, but I think it ought to be done at the State level. And if I could cite one shining example of how it can be done, I would point to the adoption of the UCC. That you point it out, too, clearly points out that the States have done it, they have made uniform efforts and that is the path to follow.

If the amount of money that has been expended in lobbying this bill had been expended toward a UCC approach to uniform products liability, I think it would already be passed.

Senator McConnell. If the Senator from Alabama would yield——

Senator Kasten. As far as we can determine in our committee, there is a key difference between the uniform commercial code and the opportunity or the likelihood of the States adopting a uniform product liability code, and that is that there is a huge amount of money that trial lawyers are making as a result of the present system in tort law. The contingency fees and the other huge amounts of money that just was not there in contract law, therefore——

Senator Heflin. Do you mean to tell me that the commercial lawyers of the country, the incomes of the large corporate firms do not exceed the total income of the trial lawyers?

Senator Kasten. Well——

Senator Heflin. I would have to see some strong statistics to believe otherwise.

Senator Kasten. I do not have any statistics——

Senator Heflin. I would say that probably the Washington lobbyists who are also lawyers have total income around here of $400 or $500 an hour. Their incomes probably exceeds that of the trial lawyers of the D.C. area.

Senator Kasten. As far as we can determine, in 1979, when the Carter administration had a Uniform Product Liability Act that they sent out to the various States, they developed it here, not unlike the uniform commercial code, they sent it out to the various States hoping that it would be adopted State by State by State.

At that point, an unprecedented lobbying effort came in opposition to the Uniform Product Liability Act State by State by State, primarily by trial lawyers through a very, very heavy organized opposition. In some States they testified—Pennsylvania is a good example—they testified "we don't want a Pennsylvania law, what we need is a Federal law, so if you Pennsylvania legislators think you are going to solve the problem here in Pennsylvania, you are not, we're against the Pennsylvania law," they testified in Pennsylvania, "we're for a Federal law," said the trial lawyers testifying in Pennsylvania on the adoption of the uniform product liability code in Pennsylvania for Pennsylvania.

Now, I would have preferred, frankly, that we could have done it State by State by State, as we did with the uniform commercial code.

Now, I looked recently—you might have seen the article in the New York Times the other day of the special interest groups that contribute to campaigns, and trial lawyers were right up there, I think No. 1 or No. 3 or No. 4 they had the realtors, two or three unions, and then the trial lawyers. The fact is that an awful lot of State legislators are former trial lawyers and an awful lot of legislators here are trial lawyers, and they have a very effective, tough, hard-working lobby and they lobbied against product liability State by State by State, and they won. Roughly half the States did nothing, the other half of the States adopted something, but not one State adopted, not one state adopted the exact uniform law that the Carter administration was hoping would be adopted nationwide.

So we have the continuing patchwork of law which works in the favor of those who make their money on the transaction costs in this area, and they are doing well and they are lobbying like crazy, and they are our opposition.

Senator HEFLIN. Well, I believe also I could add up about 15 on the other side and put the total amount of money that has been spent in regards to that, but that is not my concern. My basic concern is the ultimate, which this will mean the complete and ultimate death of federalism and which is my major concern.

Thank you, sir.

Senator BROYHILL. The Senator from Kentucky has another comment?

Senator McCONNELL. I will pass. Thank you.

Senator BROYHILL. Thank you. I would like to make one clarification. As I understand what the Senator from Wisconsin said, his amendment would only override State law with respect to the area of liability for defects where a manufacturer could not have known about or the liability for harm due to the unauthorized alteration or misuse of a product. Is that correct?

Senator KASTEN. That is correct, and that is the Kasten-Lugar amendment.

Senator BROYHILL. Thank you very much for your testimony. And thank you for your leadership in this area.

Senator KASTEN. Thank you very much.

Senator BROYHILL. At this time the Chair would ask the panel of witnesses to come forward: Mr. Robert Habush, of the American Trial Lawyers Association, Mr. John Scott, representing Dickinson, Wright, Moon, Van Dusen and Freeman, and Mr. Kendall Few, of Few and Glenn.

We are delighted to welcome you gentlemen to the committee this morning. We are glad to have your testimony. As with past practice, we will be glad to include your testimony in the record, let you summarize and then perhaps respond to some questions that the members of the committee have.

At this time I would like to recognize Mr. Robert Habush, of the American Trial Lawyers Association.

PANEL CONSISTING OF ROBERT J. HABUSH, PRESIDENT, ASSOCIATION OF TRIAL LAWYERS OF AMERICA; JOHN E.S. SCOTT, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN; AND KENDALL FEW, FEW & GLENN

Mr. **Habush**. Thank you, Mr. Chairman. It is an honor to be here. I am Bob Habush. I am the president of the Association of Trial Lawyers of America. I represent 70,000 men and women in the United States and in Canada.

I think the Chair may recognize some differences of thought on this subject from the previous witness from Wisconsin, since I am from Milwaukee, in Senator Kasten's State.

I have filed a paper with the committee and ask that the committee, if they have time, to refer to it.

It has been an interesting year for me so far. Lawyer-bashing has replaced Trivial Pursuit as the Nation's favorite pastime, and I think it comes as no shock to the committee members that the Association of Trial Lawyers of America appear against S. 2760.

I think, although my self-interest is evident and obvious, we should also keep in mind that we can understand how businesses and corporations and other entities would like to not be sued and would like to curtail their exposure to lawsuits. But I think it is a mistake, Mr. Chairman, to cast this dispute as one of trial lawyers versus the business community.

I think it is important for the committee and the Senate to keep in mind that there is a coalition of opposition to product liability bills that have been proposed, made up of the consumer organizations of America, and a group representing 45 million consumers—and you will hear from the consumer representatives later—and also organized labor. Unfortunately, the victim groups have no other lobby other than yourselves and us and the consumer groups and are unable to participate in the kind of phone-a-thon that occurred this week.

Let me tell you, since you are used to hearing what trial lawyers do not like and what trials lawyers are opposed to, what this trial lawyer is in favor of. I am opposed to frivolous lawsuits and frivolous defenses and I am in favor of strong sanctions against lawyers who continue this practice.

I am opposed to excessive plaintiff's fees and defense fees, and I am in favor of condemnation of attorneys who engage in this practice.

I am in favor of lowering transaction costs in litigation. I am in favor of alternative dispute resolution methods which can get payments to the consumer and to individuals if that method is voluntary and contains no restrictions.

And I must tell you, Mr. Chairman, that we lawyers share some of the blame with the media for the perception in America that this is a runaway, litigious society, with juries running amok, for my members and myself have been quick in recent years to see that the successes that we have had were publicized when in fact the losses and the less modest results were not.

But I think it is important to ask yourself the question, has everybody in America suddenly become a bad risk? Because of the pressure that you are facing, consider the unreality of what has been going on.

When products liability legislation first had its start in the mid-seventies, there was a price problem and availability problem, but in the late seventies and the early eighties, when product liability legislation was proposed, the hallmark of the legislation was uniformity. There was no question or any suggestions that it was too hard to get or high priced. That was because insurance companies were making money, they were lowering rates, and the product was available.

It has been only since the granddaddy insurance crisis of 1986 occurred that we have had the suggestion that it is products liability cases have caused the insurance crisis and that any legislation on this subject is going to cure it.

Let me suggest to you, Mr. Chairman, in all respect, that this is not true. Prof. Joseph Page, of Georgetown School of Law, testified in March of 1985 before the Commerce Committee:

> There is no reason to believe that the tort system contributed at all to the decrease of product liability insurance premiums at the end of the last decade or to the increases which may currently be taking place. No correlation in the slightest exists between expansions or contractions of tort doctrine during those periods and the level of premiums. The same may be said with respect to the size of jury awards and settlements.

I do not think that anyone who has been following the studies and the accounts of this insurance crisis should have any question left in their mind that the insurance crisis was cause by the insurance companies.

The Consumer Reports, which is a magazine put out by a middle-of-the-road consumer organization, has 3 million circulation, in August of 1986 said it best: "The Manufactured Crisis: Liability insurance companies have created a crisis and dumped it on you."

Mr. Chairman, I submit that this is not a plaintiffs' trial lawyer magazine and the article pretty clearly establishes where the fault lies.

In an editorial, Saturday, August 30, 1986, the Chicago Sun-Times' headline is, "What Liability Crisis?" and concludes and says, "The facts underscore the major point: Don't undertake major reforms that entail the loss of important individual rights until it is demonstrated that changes are absolutely necessary. They weren't."

The National Association of State Attorneys General studied this problem and concluded that it was the insurance industry that caused the unavailability and increase of insurance costs.

The Consumer Federation of America studied this question and determined that jury verdicts have not increased any faster than the inflation rate, including products liability verdicts.

And Mr. Herman, who is the chief executive of the Jury Verdict Research, the source for that insidious $1.8 million average of products liability which has been discredited and disputed repeatedly but is consistently quoted by Assistant Attorney General Willard, says:

> The problem is not that jurors are out of control or, with exceptions, make ridiculous awards, but the problem is the effect that newspaper reports of very high verdicts, which may or may not be justified by the facts, have upon the public, the lawyers, and the insurance carriers.

Mr. Chairman, the Rand Study which just came out concluded that the entire civil justice system in this country costs between $28 and $35 billion a year. Mr. Chairman, we spend $40 billion a year on tobacco and $60 billion a year on alcohol in this country.

Let me suggest, Mr. Chairman, that the bill proposed does not answer the problem. The cap is a one-way street. It penalizes the most severely injured. It tells the injured plaintiffs that if you want to go ahead and do not accept $100,000 plus your net economic loss, you can try the case for $150,000 more. If the manufacturer of a defective product wants to be arbitrary, they get slapped on the wrist with a $100,000 penalty for lawyers fees which has a substantial loophole, that if it is determined to be a complicated case, that penalty does not even evolve.

Worse than that, the most severely injured and the most severely hurt are penalized by this particular cap. The joint and several provision will in my opinion of 25 years of practice reduce settlements. And although I respect Senator Danforth's desire to increase settlements, the elimination of joint and several liability will have the exact opposite effect.

It is important to remember that anyone who is included in a judgment, if sued separately, would have been found liable. So even a person who is found 20 percent negligent has to be a substantial factor in producing the damages and the injuries.

The provision of collateral source, Mr. Chairman, transfers the cost of defective products to third-party carriers and accident carriers and health carriers and workmen's compensation carriers. The belief that under the "collateral source rule" that people get double recovery is crazy. Subrogation clauses and workmen's compensation repayment all over the country prevent people from getting double recovery.

The suggestion that punitive damages cannot be awarded if the FDA and the FAA pass muster on a product also is a bad provision. I only remind the Chairman and the committee that the FAA approved the Beechcraft Bonanza that had an annoying characteristic of having its tail fall off while in flight. This was a plane that had been determined airworthy by the FAA and which has since been determined to have a negligent design.

In the early sixties, a drug company put out a product called Quadrigen, which was a childhood vaccine shot approved by the FDA and which was withdrawn some years later, after damaging thousands of youngsters in this country. And I speak of that with personal knowledge since a close relative of mine was one of those victims.

Mr. Chairman, the withdrawal of asbestos from the market and dioxin from the market, the withdrawal of Dalkon Shields and Rely Tampons, the withdrawal of and the change of Pintotype gas tanks, the change in the Drano cans and the Liquid Plumber cans, and the removal from the market of children's cotton pajamas which burned up little children in several seconds, was the result of litigation. And I respectfully suggest to this committee and to the Senate that if S. 2760 was law, Dalkon Shields would still be on the market, asbestos would still be in your schools, Pinto-type gas tanks would still be in cars, and little children would still be wearing cotton flannelettes.

I thank you.

[The prepared statement of Mr. Habush follows:]

BEFORE THE
JUDICIARY COMMITTEE
OF THE
UNITED STATES SENATE

Statement of the
Association of Trial Lawyers
of America

September 10, 1986

Mr. Chairman and Members of the Committee, my name is Robert L. Habush. I am President of the Association of Trial Lawyers of America. We are pleased to appear today to present our views on S. 2760, the Product Liability Reform Act.

The Association of Trial Lawyers of America strongly opposes S. 2760. We do so for two reasons. First, the legislation would not solve the insurance problems that have plagued this nation for the past year. Second, the legislation would unfairly penalize individuals harmed by defective products.

S. 2760 would not solve the insurance crisis because the tort system has not caused the recent increase in insurance costs and decrease in insurance availability. To the contrary, the evidence indicates that the insurance industry itself caused the crisis.

S. 2760 is unfair because it would allow manufacturers of unsafe products to impose unilaterally a cap of $250,000 on damages for pain and suffering regardless of either how severe the injury or how strong the claimant's case might be. S. 2760 would also deny injured individuals adequate compensation by eliminating joint and several liability for non-economic damages, thereby reversing a long-standing common law rule.

The irony of the debate over product liability legislation is that, at the same time that the insurance industry calls for product liability legislation, it continues to resist federal oversight of insurance. The industry urges that individuals who suffer injuries caused by others should not receive adequate and equitable compensation, but it refuses to state that it will lower prices and increase coverage or even accept greater accountability to federal and state regulatory bodies.

Congress should not allow this shell game to continue. The true causes of the insurance crisis must be addressed. Improvements in the regulation of domestic insurers and initiation of regulation of foreign reinsurance companies are essential first steps.

I. THE INSURANCE INDUSTRY'S CLAIMS OF UNPROFITABILITY ARE UNFOUNDED.

The insurance industry persistently has argued that increases in the number of claims and the amount of claims paid has forced it to increase prices and to remove coverage from manufacturers and sellers of products. With at least equal vehemence, the industry has refused to provide data on premiums paid, investment income, and actual claims paid by class of coverage. Purchasers of insurance, as well as governmental bodies, have no recourse against the industry's refusal to provide data, at least at the federal level.

Nonetheless, the data that has become publicly-available belies the claims of the insurance industry. For example, earlier this year, the industry stated losses of over $5 billion in 1985. When challenged by the National Insurance Consumer Organization, the industry acknowledged a profit of at least $1.7 billion, even though the data gathered by NICO show a profit level even higher.[1/] The General Accounting Office found in an April 1986 study that the property/casualty industry has made between $50 and $75 billion in net gains over the period 1976-1985.[2/]

For every year from 1967 through 1984, the difference between industry assets and liabilities also has grown. The largest growth took place during the large price increases of the period 1975 through 1980, when premium income was augmented by extraordinary investment income. Surpluses have continued to grow steadily, though less dramatically, from 1980 through 1984, the most recent year for which aggregates are available.[3/]

In addition, property/casualty insurer's profit rose from 2% of net worth in 1984 to an estimated 7% in 1985.[4] If the effects of dividends paid to stockholders and unusually high hurricane losses in 1985 were removed, the industry's return on net worth in 1985 would have been about 13%, about the average for all American industries.[5]

Best's Property/Casualty Stock Index indicates that insurance stocks have continuously outperformed the Dow Jones Index over the last five years. Last year, "the most spectacular performance" by a component of Best's Insurance Industry Stock Index was that of property/casualty stocks, which advanced 50%. Sparking the 1985 market return, according to Best's Insurance Management Reports, was the recording in the second quarter of 1985 of the first increase in property/casualty operating earnings in two years.[6]

In fact, the General Accounting Office has found that "estimated data for 1985 indicates that the underwriting cycle has turned and is now moving in a positive direction. Indeed, the industry itself is projecting substantial net gains over the next five years."[7] The GAO calculates that the property/casualty industry will enjoy net gains in excess of $90 billion over the next five years. According to the National Insurance Consumer Organization, the industry profits increased 405% in the first half of 1986 over the same period last year. Return on net worth was up more than 300% in the first quarter of 1986.[8]

In short, the insurance cycle has turned again. Recent press reports relate the easing of the crisis. Yet the call for restrictions on the rights of injured product users continues unabated.

II. THE STATE PRODUCT LIABILITY SYSTEM HAS NOT CAUSED CURRENT INSURANCE PROBLEMS

Proponents of product liability legislation claim that curtailing the rights of those who suffer personal injuries will ease the current "crisis" in availability and affordability of insurance. The same outcry for product liability reform was heard in the late 1970's when the insurance industry was experiencing another "crisis."

During the mid-1970's, product liability insurance rates increased significantly. One of the justifications offered by the insurance industry was that there had been a staggering rise in the number and size of product liability lawsuits. Some insurers claimed that there were one million claims annually. The Interagency Task Force on Product Liability formed in 1976, as well as other studies, discovered that the allegations were unfounded. For example, the Interagency Task Force concluded that the "best estimate" of claims filed in 1976 is between 60,000 and 70,000.[9/]

By 1983, insurance industry and manufacturing industry representatives were acknowledging that product liability insurance costs had decreased, and deemphasizing insurance costs as a reason for passage of product liability legislation. Last year, insurance costs again increased substantially. Once again, proponents of product liability legislation claim it is a solution to the problem.

The product liability system that is blamed for the current "crisis" and was blamed for the "crisis" in the mid-1970s also existed during the years between 1975 and 1980 when the insurance industry prospered. As Professor Joseph Page of Georgetown School of Law stated in March, 1985:

> There is no reason to believe that the tort system contributed at all to the decrease of product-liability insurance premiums at the end of the last decade, or to the increases which may currently be taking place. No correlation in the slightest exists between expansions or contractions of tort doctrine during those periods and the level of premiums. The same may be said with respect to the size of jury awards and settlements.[10/]

The evidence simply does not support the repeated claims that an explosion in lawsuits and jury awards have caused the current insurance problems. Study after study has reached this conclusion. In its investigation of the insurance crisis, the Monopolies and Commercial Law Subcommittee of the House Judiciary

Committee has found that, over the past five years, the property/casualty industry has paid out in product liability bodily injury claims only 29 cents for every premium dollar collected. The National Association of Attorneys General Ad Hoc Committee on Insurance concluded in its study of the crisis that "the cyclical nature of the industry, and not any changes in tort claims, is largely responsible for the crisis."[11]

The National Center for State Courts just completed a preliminary study of reliable and comparable tort, contract, and real property rights statistics from twenty states on the number of lawsuits filed. The study found that the data "provides no evidence to support the existence of a national 'litigation explosion' in state trial courts during the 1981-1984 time period." For all tort lawsuits, including product liability suits, the number of filings increased 7% between 1981 and 1984, but the population increased 4% during that same time period. Over the period 1978-1984, the number of tort filings increased 9%, while the population grew 8%.[12]

Even Jury Verdict Research, Inc., the source relied on by proponents of tort restrictions, has found no explosion in product liability awards. According to the President of Jury Verdict Research, "It is significant to note that the product liability midpoint verdict, which includes million dollar verdicts, has remained relatively stationary."[13] Indeed, using the JVR, Inc. data, Consumer Reports found that, over the past 20 years, the midpoint product liability award barely exceeded the increase in the Consumer Price Index.[14] As the President of JVR, Inc. concluded, "The problem is not that the jurors are out of control or, with exceptions, make ridiculous awards, but the problem is the effect that newspaper reports of very high verdicts, which may or may not be justified by the facts, have upon the public, the lawyers, and the insurance carriers."[15]

Nor is it easy to recover damages in product liability cases. A preliminary report of the American Bar Foundation found just the opposite to be true. For the seven counties from across the country studied, the percentage of cases in which the plaintiff was successful ranged from 28.6% to 56.3%, and only in New York City did the plaintiff win more than half the time. It is even more difficult to win punitive damages. Only 11 out of 402 product liability cases in the seven counties resulted in an award of punitive damages.[16]

The jury system works. The oft-cited million dollar awards do not evidence a tort system run amok. In more than 70% of cases with million dollar awards over the past 14 years, the plaintiffs have suffered permanent paralysis, brain damage, amputations, or death.[17] It is for these injuries that S. 2760 would take away the prerogative of the jury and cap damages for pain and suffering.

III. S. 2760 IS UNFAIR

The Association of Trial Lawyers of America consistently has opposed the statutory preemption of common law rights precisely because of our conviction that the tort system is the most equitable mechanism for providing redress for injuries. S.2760's preemption of state tort law is unprecedented. Its jurisdictional mechanism also is without precedent. The legislation establishes federal standards but fails to create federal court jurisdiction in the absence of diversity jurisdiction. In short, for the first time, the Congress would on the one hand usurp the states' traditional right to develop tort standards, yet, on the other hand, impose on the states the exclusive responsibility for applying federally - created rules.

The recent reexamination of the tort system detailed above confirms our conviction. S. 2760 therefore is objectionable in principle. We, however, would like to discuss two provisions in the legislation which particularly warrant analysis because of their inequitable abrogation of the rights of injured product users.

A. S. 2760 Allows Manufactures To Impose Unilaterally A Cap on Pain and Suffering

Title II of S. 2760 would allow manufacturers of unsafe products to impose unilaterally a cap on damages for pain and suffering. Damages in the case of the most severe injuries are limited to net economic loss plus a maximum of $250,000 whenever a manufacturer makes a settlement offer of net economic loss and $100,000. The cap is imposed regardless of the injured person's ability to prove greater damages. In short, a seriously injured claimant either accepts a settlement offer for net economic loss plus $100,000 or incurs the delay and expense of going to trial for an additional $150,000 in damages.

In contrast, the manufacturer has little incentive to accept a claimant's settlement offer in all but the most serious cases. If the manufacturer rejects the settlement offer, it must pay compensatory damages plus a penalty of no more than $100,000. Because the manufacturer will always prefer the cap in cases involving severe injuries, the only cases in which the injured victim will have a chance of full recovery are the very cases in which the manufacturer's risk of paying damages is not great.

In sum, the settlement amendment is a one-way street. In cases involving a clearly defective product and severe injury, the defendant can force the claimant to accept net economic loss plus a maximum of $250,000. In instances in which the plaintiff's case is more difficult to prove or the injury is less severe, the defendant has little incentive to agree to the settlement.

The exact calculations that would occur under S. 2760 will depend upon the facts of each case. But regardless of the facts, the manufacturer always controls the calculus.

Allowing the unilateral imposition of caps on the claimant's recovery tips the balance even further in favor of the manufacturer. The claimant already has powerful reasons to settle. As Professor Owen M. Fiss points out, the claimant

> may need the damages he seeks immediately and thus may be induced to settle as a way of accelerating payment, even though he realizes he would get less now than if he waited judgment. . . . Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses the defendant can impose through the manipulation of procedural mechanisms such as discovery.18/

The settlement provision does not present the manufacturer with corresponding reasons to settle, but rather allows the manufacturer to manipulate settlement to avoid damages in cases of substantial injury.

Allowing the unilateral imposition of a cap on damages leaves injured product users without adequate compensation. As indicated above, more than two-thirds of the $1 million dollar verdicts in tort cases over the last 14 years involved death or severe, permanent injury. The pain and suffering experienced by victims in these cases is real, and the law has always recognized it as such.

In particular, a cap on recovery of damages for non-economic loss would penalize those who suffer severe injuries, such as loss of reproductive capacity or amputation of an arm, but experience limited medical expenses or lost wages. As the Dalkon Shield example illustrates, these caps will be especially harmful to women who may suffer permanent injury but little economic loss.

Title II of S. 2760 would deny the recovery of damages for pain and suffering in order to promote settlements. The system should be made more efficient. But as indicated above, the claimant already has powerful incentives to settle. Imposing caps on damages is an irrational and inequitable way to promote an otherwise laudable goal.

Finally, the proposed amendment will undercut the incentive placed upon manufacturers to produce safe products. The manufacturer, knowing that it can impose caps virtually at will, will not have as great a concern about the consequences of marketing an unsafe product. Indeed, manufacturers will have every incentive and all of the tools to do the same type of "cost-benefit" analysis that Ford Motor Co. conducted in the case of the Pinto.*/ The debate over product liability legislation is not just about whether the manufacturer or the injured party must bear the costs of the injury. Tort law serves the crucial function of deterring unsafe behavior. Limiting damages can only serve to increase the number of injuries and the costs that they impose.

B. Abolishing Joint And Several Liability For Non-Economic Damages Will Leave The Plaintiff Less Than Fully Compensated, While Lessening Incentives For Settlement And Safety

Section 308 of S. 2760 would abolish joint and several liability for noneconomic damages, thereby shifting the damages attributable to insolvent or underinsured defendants to the injured claimants themselves. Virtually all states apply the doctrine of joint and several liability. Under the doctrine of joint and several liability, if the plaintiff is injured by a defective product and one or more of the defendants is unable to pay, the remaining defendants must compensate the plaintiff for the entire amount of the damages. It bears emphasis that defendants are jointly and severally liable only when there is an indivisible claim for the same injury. In other words, the doctrine applies only where the claimant's injury would not have happened at all but for any of defendants' wrongful conduct. See Prosser, The Law of Torts § 52 (5th Ed. 1984).

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*/ Moreover, since the amount of economic loss the claimant can recover is reduced by any amount received from collateral sources, the amendment makes the manufacturer the payor of last resort for the claimant's injuries. Shifting part of the responsibility for claimant's injury to insurance companies insuring the claimant and to the government destroys the basic policy of current product liability law that those responsible for placing defective products on the market should bear the costs of the injuries they cause. Manufacturers with diminished responsibility for defective products will have fewer incentives to manufacture safe products in the future.

In contrast, under the principle of several liability, the plaintiff must forego being compensated for part of his injury. Such a shifting of responsibility is completely contrary to the policy behind the tort law to make the plaintiff whole.

Even the majority of states that have adopted comparative responsibility principles which require comparing the proportion of responsibility of each of the parties have nonetheless refused to abrogate the joint and several liability doctrine. They have adhered to the policy of assuring that a plaintiff recovers fully for his injuries.[19/] The Supreme Court of Alaska, for example, recognized that "[T]he joint and several liability doctrine continues, . . . to play an important and legitimate role in protecting the ability of [an] injured person to obtain adequate compensation for his injuries from those tortfeasors who have . . . inflicted the harm." Artic Structures, Inc. v. Wedmore, 605 A.2d 426, 434 (Alaska 1979). Similarly, the Court of Appeals of Michigan reaffirmed use of the doctrine, stating that "[a] plaintiff is entitled to collect the whole judgment from any defendant, without regard to the relative degree of fault between the defendants." Ferdig v. Melitta, Inc., 320 N.W.2d 369, 374 (Mich. App. 1982).

Abolishing joint and several liability for noneconomic damages is unfair because it penalizes an innocent plaintiff, and allows the defendant, who is culpable for placing a defective product on the market, to limit his liability. The courts have consistently made the explicit decision that fairness and the goal of making a victim whole justifies the imposition of joint and several liability. S. 2760 makes exactly the opposite decision: that defendants responsible for an indivisible harm should nonetheless not be responsible for the damages caused by that harm.

Ironically, abolition of joint and several liability works at cross-purposes with S. 2760's stated goal of encouraging settlements. Under the joint and several liability rule, a defendant manufacturer has strong incentives to settle precisely because it knows that he might be held responsible for the entire loss if he does not settle. Under the several liability rule in S. 2760, the manufacturer will be more likely to let the dispute go to litigation because it knows that its liability is limited.

IV. S. 2760 WOULD NOT MAKE PRODUCT LIABILITY INSURANCE MORE AFFORDABLE OR AVAILABLE

Experience has shown that imposing restrictions such as those in S. 2760 do not result in reductions in insurance costs. For nearly a decade Ontario, Canada has imposed a cap on noneconomic damages and has prohibit punitive damages awards. Nonetheless, Ontario suffered an insurance crisis. The insurance industry raised premiums by 400 percent, cancelled coverage in mid-term, and refused to provide coverage at any price.[20]

In this country as well, the enactment of limitations on tort lawsuits has not resulted in any abatement of the insurance "crisis". Wisconsin, Pennsylvania and Florida have had caps on personal injury awards for several years. Nonetheless, in those states, many cities, counties, villages and other governmental units were unable to obtain liability insurance last year. Similarly, in his study of medical malpractice bills enacted in the 1970's, Professor Frank Sloan found no evidence that the legislation enacted "had their intended effects on premiums."[21]

The State Senate of Georgia has actually tried to couple tort reform with rollbacks in insurance premium rates. The insurance industry, a proponent of tort legislation in the state until this bill was introduced, now claims that a link between tort reform and premium reductions cannot be made.[22] In Florida, the legislature imposed a $450,000 cap on noneconomic damages but also required a rollback in premiums. Two days later, six insurance companies stated that they would not offer any new commercial insurance in the state.[23]

In March, the State of Washington enacted legislation covering all tort cases which imposes restrictions on rights similar to those being advocated in Congress. Since mid-March, 150 insurance companies have filed requests for premium hikes. The insurance commissioner rejected the requests on the grounds that the new law is supposed to address the insurance problem. At least six companies have refiled claiming that tort reform would not have a significant impact on rates. More refilings are expected.[24]

V. INSURANCE INDUSTRY PRACTICES HAVE CAUSED THE CURRENT AVAILABILITY AND AFFORDABILITY PROBLEMS

Tort restrictions have not solved insurance problems because the insurance industry itself has caused those problems. Two mutually reinforcing practices have led to increased costs and decreased availability. First, the industry has made income from the investment of loss reserves the driving force in its profit picture. Second, it has adopted subjective pricing practices which divorce insurance rates from the risks it covers. As a result, the industry has created a disastrous cycle in which prices are cut and coverage expanded when profits are easily attainable, and premiums are increased and capacity shrunk when available profits are squeezed from the market.

The property/casualty sector of the insurance business historically has alternated between "soft" and "hard" insurance markets. When rates are adequate, risk selection careful, and the industry is generally performing well, new capital is attracted from a number of sources and capacity increases.

These new sources of capacity begin to generate increased competition for available premiums volume, which results in price cutting. For commercial lines of insurance, corporate insurance buyers can force substantial discounts through use of their market knowledge and economic leverage. Increased competition also means that underwriting standards for risk selection diminish; to maintain market shares, insurers take on less-than-standard business at discounted rates. Such practices inevitably result in rising claims losses.

When competition is too severe and losses high, the market begins to harden. Capacity shrinks as insurers withdraw from the market. The remaining insurers raise prices and tighten underwriting standards, and availability and affordability problems emerge. The market eventually stabilizes, and the return of profitability in turn leads to another soft market.

In the late 1970's, interest rates accelerated the normal movement of the cycle. With rates reaching historic highs of up to 20 percent, insurance companies were eager to obtain premium income for investment and therefore slashed prices and sold policies that were extremely risky. They ignored the claims data compiled on particular lines of business. In 1980, Business Week stated that, "judged by this year's performance, a case can be made that executives of the nation's $100 billion property/casualty insurance have the shortest memories in corporate America. In the mid-1970's when the industry came perilously close to collapse. . . most insurers vowed never again to engage in self-destructive competition. But as insurers report their results for the third quarter of 1980, it appears that the lessons of the last downturn are being forgotten." Noting that average prices dropped by 10% in 1979, 15% in 1980 and by 50% on some risks, one insurer stated "There is no rhyme or reason to it".[25/]

In short, the competition for cash for investment led to pricing decisions unrelated to risk. The Government Accounting Office found that from 1976 to 1985 the property/casualty industry experienced $65 billion in underwriting losses but earned approximately $140 billion in investment income.[26/] As the National Journal recently reported the views of one industry representative, "'We essentially abandoned the traditional approach' of calculating premiums on the basis of risk . . . 'It was hog heaven for a while' as investment profits more than spanned the gap."[27/]

In the early 1980s, the same companies continued to cut prices until rates fell so low that companies were beginning to experience losses. The losses increased as claims arose on the policies sold at deep discounts. Insurance companies, when faced with the bottom of the cycle, began raising premiums--only this time, in contrast to 1975, premiums were often raised by 500 or 1,000 percent, or policies were discontinued altogether.

The reinsurance industry also has trapped itself in a destructive business cycle. Reinsurers provide insurance coverage to the primary underwriters, thereby allowing insurance companies to spread their risks and increase their capacity. For the most part, foreign companies control the American reinsurance market, which represents approximately 50% of the world property/casualty market. It is estimated that foreign reinsurers may account for up to 65% of the reinsurance in the United States.28/

In recent years, reinsurers have demanded huge price increases or withdrawn from the U.S. market altogether. This, in turn, exacerbates the effects of the primary insurance market's cycle. As the president of the Reinsurance Association of America explained, "Reinsurers' actions are the ones that probably forced the cycle to come around...."29/

Like the primary underwriters, reinsurers have acknowledged that they have caused their own problems. One reinsurance company representative stated, "The capacity shortage is a direct result of reinsurers failing to do our job and underpricing our product, [while] the losses are piling up." In the mid-1970's, high prices and market opportunities brought a number of new entrants to the reinsurance business. Many of the new entrants cut prices and paid little attention to risk, a development that one reinsurance industry representative terms the "dumb factor." Most established reinsurers also participated in the price-cutting to preserve their market share. Because of these unwise pricing decisions, some companies became insolvent and many withdrew from the market. This triggered the new and predictable turn in the cycle. According to a reinsurance broker, the withdrawal of companies is "benefiting the big reinsurers. They know it, and right now they're charging a high price to do business with them."[30]

The industry has blamed the tort system for the current affordability and availability problems. Those who have studied the situation carefully disagree. In a recent editorial, Business Week concluded that "mainly the industry shot itself in the foot":

> For many years, insurance carriers slashed premium prices and wrote as much insurance as they could get. Many companies abandoned traditional underwriting standards and competed fiercely for premium dollars they could invest in high-yield debt. This so-called cash-flow underwriting is probably responsible for most of the damage to company balance sheets today. The party ended when interest rates declined just as claims began to pour in.
>
> With careful management, these mistakes can be corrected. But instead, the industry has spent most of its time and energy lately mobilizing attacks on the U.S. tort system. Admittedly, damage awards often seem excessive, though appellate courts frequently cut them back. But the industry's charge that more litigation and larger damage awards are the causes of its red ink is, at best, unproved.

The editors suggest that changing the insurance system "is a better way to deal with liability claims than restricting the right of injured people to their day in court".[31]

VI. THE INSURANCE INDUSTRY IS NOT REGULATED ADEQUATELY

The recent surge in property/casualty profits and the easing of the insurance crisis indicate that the cycle will turn again. It remains to be seen whether, unlike in the early 1980's, the industry will not repeat past mistakes. Improved regulation of the industry would promote this end.

The insurance industry is the only large-scale financial service sector not directly regulated at the Federal level of government. In 1944, the Supreme Court reversed an 1869 decision and ruled that insurers were subject to federal antitrust laws. The Congress responded in 1945 by enacting the McCarran-Ferguson Act (15 U.S.C. §§ 1011-15 (1970)), which exempts the insurance industry from federal antitrust laws to the extent that states provide similar antitrust supervision. McCarran-Ferguson left the supervision and regulation of insurance to the states and exempted the insurance industry from those sections of the antitrust laws that prohibit price-fixing.

According to a GAO study of state insurance departments, there are many deficiencies in the state regulatory system.[32/] In particular, the study determined that "most State insurance departments do not have systematic procedures to determine whether insurance consumers are being treated properly with respect to such matters as claims payments, rate-setting, and protection from unfair discrimination." Moreover, the report found that generally the number of staff members with professional training is small, little is spent to upgrade skills, and salary levels are relatively low. In the area of trade practice regulation, most states do not have specialized examiners or the capacity to do computerized audits. Finally, the GAO found that "insurance regulation is not characterized by an arms-length relationship between the regulators and the regulated."

VII. INSURANCE REFORMS ARE THE EFFECTIVE SOLUTION

It is clear, then, that the insurance industry, not the product liability system, needs reform. The following steps represent the best manner in which to ensure that insurance remains affordable and available. First, the McCarran-Ferguson Act should be repealed, and the industry's exemption from Federal Trade Commission jurisdiction should be eliminated. Second, Congress should create a federal office of insurance to monitor the industry and establish regulatory standards for state insurance commissions. Third, Congress should expand the Risk Retention Act, which currently allows product manufacturers, but not other businesses or organizations, to join together to self-insure or to purchase group liability insurance. Finally, Congress should establish a federally-operated but industry-funded reinsurance program such as was used for urban riot reinsurance.

Reforms at the state level also are needed. First, state law should require disclosure of loss data on a line-by-line basis so that regulators may determine whether rates are excessive, inadequate, or unfairly discriminatory. Insurance rates should be set on the basis of actual claims and loss experience rather than subjective judgments about risk, and insurance regulators should implement thorough data-verification techniques, including the use of outside auditors if appropriate. Second, insurers should be required to disclose fully both premium and investment income so that valid rate regulation may be implemented. Third, state insurance regulatory bodies should be empowered to regulate reinsurers and excess and surplus-line carriers. Fourth, states should develop reinsurance programs. Finally, citizens' insurance boards, modeled after the existing citizens' boards in the utility area, should be established so that purchasers of insurance have a role in the oversight of the insurance industry.

CONCLUSION

As numerous insurance industry officials have admitted, the industry itself has caused the current "crisis" in the affordability and availability of insurance. It therefore is not surprising that no evidence exists either that the tort system has caused the current problems or that S. 2760 or similar legislation would make insurance more available or less expensive. Such legislation would, however, deny injured individuals fair compensation and diminish the incentives for safety that the tort system creates. The solution to problems of affordability and availability lies in insurance reforms that counterbalance the industry's cycle and that help prevent the industry from engaging in subjective pricing and arbitrary coverage decisions.

FOOTNOTES

1/ Washington Post, January 14, 1986, p. D-8.

2/ Statement of Johnny C. Finch, Senior Associate Director, Before the Subcommittee on Oversight, the House Committee on Ways and Means, April 28, 1986.

3/ Robert J. Lowe, Casualty Actuaries, Inc., Property/Casualty Insurance Industry; An Analysis, February 19, 1986, p. 2, 5.

4/ Id.

5/ National Insurance Consumer Organization, Release of January 6, 1986, p. 2.

6/ Best's Insurance Management Reports, "1985 Insurance Stock Trends," January 20, 1986.

7/ Statement of Johnny C. Finch, Senior Associate Director, Before the Subcommittee on Oversight, House Committee on Ways and Means, April 28, 1986.

8/ National Insurance Consumer Organization, "Report on First Quarter 1986 Property/Casualty Insurance Industry Profitability."

9/ Interagency Task Force on Product Liability, Final Report VI-55 (1977).

10/ Statement of Joseph Page before the Senate Committee on Commerce, Science and Transportation, March, 1985.

11/ National Association of Attorneys General Ad Hoc Committee on Insurance, "An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance," May, 1986.

12/ Court Statistics and Information Management Project, National Center for State Courts, "A Preliminary Examination of Available Civil and Criminal Trend Data in State Courts for 1978, 1981, and 1984," April, 1986.

13/ Report of Jury Verdict Research, Inc. to the Subcommittee on Economic Stabilization of the House Banking Committee, August 6, 1986.

14/ "The Manufactured Crisis," Consumer Reports, August 1986, 544, 546.

15/ Report of Jury Verdict Research, Inc. to the Subcommittee on Economic Stabilization of the House Banking Committee, August 6, 1986.

16/ Daniels "Punitive Damages: Storm on the Horizon?" prepared for delivery at American Bar Foundation Fellows Seminar, Baltimore, MD, February 8, 1986.

17/ "The Manufactured Crisis," Consumer Reports, August 1986, 544, 546-47.

18/ Fiss, "Against Settlement," 93 Yale L.J. 1073, 1076 (1984).

19/ *See, e.g., Coney v. J.L.G. Industries, Inc.*, 454 N.E.2d 197 (Ill. 1983); *Royal Indemnity Co. v. Aetna Casualty & Surety Co.*, 229 N.W.2d 183 (Neb. 1982); *Ferdig v. Melitta, Inc.*, 320 N.W.2d 369 (Mich. 1982); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W.Va. 1979); Missouri Pacific Railroad Company v. Whitehead & Kales Company, 566 S.W.2d 466 (Mo. 1978).

20/ National Insurance Consumer Organization, "What Happens to Insurance Rates When 'Tort Reform' Legislation is Enacted?" January, 1986.

21/ Sloan, "State Responses to the Malpractice Insurance Crises of the 1970's: An Empirical Assessment," 9 Journal of Health Politics, Policy and Law 4, 29 (1985).

22/ "Tort Reform in Georgia Carries Price Tag," Journal of Commerce, March 5, 1986, p. 12A.

23/ "The Manufactured Crisis," Consumer Reports, August 1986 at 547.

24/ National Underwriter, May 2, 1986, p. 4.

25/ "A Rate War Rips Casualty Insurers," Business Week, December 8, 1980.

26/ Statement of Johnny C. Finch, Senior Associate Director, Before the Subcommittee on Oversight, House Ways and Means Committee, April 28, 1986.

27/ "Finger-Pointing Distinguishes Attempts to Fix Blame for Liability Crisis," National Journal, February 15, 1986, p. 379.

28/ Testimony of Lyndon L. Olson, Jr., Chairman, Texas State Board of Insurance, Before the House Subcommittee on Commerce, Transportation and Tourism, February 20, 1986.

29/ "Finger-Pointing Distinguishes Attempts to Fix Blame for Liability Crisis," National Journal, February 15, 1986, p. 382.

30/ "Now Even Insurers Have a Hard Time Getting Coverage," Business Week, December 2, 1985, p. 129.

31/ Business Week, March 10, 1986.

32/ "Issues and Needed Improvements in State Regulation of the Insurance Business," GAO Report, PAD 78-22 (October 9, 1979).

Senator BROYHILL. Thank you very much for your testimony. Now I would like to recognize Mr. John Scott.

STATEMENT OF JOHN E.S. SCOTT

Mr. SCOTT. Thank you, Mr. Chairman. My name is John Scott. I also am a trial lawyer from Detroit, MI. I, however, practice in the defense area, representing manufacturers of a wide variety of consumer goods.

I am here in that capacity and also in my capacity as having some experience with a mediation process that the committee may wish to consider as this bill is further considered.

I am not here to criticize the concept of Federal product liability reform. I strongly support it. I have been asked to comment based upon my experience on the expedited settlement feature of the bill and also to share with the committee our Michigan mediation process which has been remarkably successful in expedited resolution of cases as well as in reducing the docket delay for those cases that do go to trial.

First, let me comment on the expedited settlement procedure. It is intended, as I read it, as an alternative dispute resolution mechanism to speed up the handling of claims. Its principal flaw, in my judgment, is the fact that the mechanism relies upon the parties themselves to make it work.

Judges are involved to resolve some of the disputes, but the system, as I read it, relies upon the parties to evaluate their own case. In my experience with alternative dispute resolution, the one fundamental factor in a successful alternative mechanism, whether it is arbitration, mediation, mini trials or summary jury trials, is the involvement of a third party in the process whose function it is to aid—prod, if you will—the parties to resolve their dispute. It is the dynamics of the involvement of a third party that is the key to its successful alternative dispute resolution process.

I have four basic criticisms of the settlement procedure of the bill as it is drafted. First, the timing of the offer is bad in my judgment. It is too soon in the process for the parties to focus on their damages. This is true for both the plaintiff and the defendant.

Second, turning to the courts to decide the validity of the offer is inappropriate in my judgment, particularly since there are no guidelines to tell the court what constitutes a valid offer. And if the purpose of the process is to remove certain claims from the court process, it does not do it as it is presently drafted.

Third, the provision for the reopening of a settlement within 5 years would be unacceptable to any defendant. It has no finality which is a necessary part of any successful settlement.

And fourth, the procedures for reimbursement will increase litigation costs and will be unacceptable to most parties because of the feature that submits a dispute to a judge as opposed to a jury.

In sum, it is my view that the procedure is complex, it is cumbersome, it is fraught with uncertainties and, finally, it will not be uniform in its application and will have the opposite effect of the laudatory aim which is intended.

Let me tell you briefly about the Michigan mediation procedure. I have described it in detail in my written statement. It is used in

Michigan statewide. It has been most successful in our most populous county, which is Wayne. There, every civil case is scheduled for participation in the mediation process.

Simply stated, based upon the written statements and oral presentations of counsel, a three-person panel of experienced litigators evaluates each case and places a settlement value on it. The parties either accept or reject this value. Cases where parties reject the valuation proceed to further settlement conference and are scheduled for trial. Rejection of the valuation figure coupled with a failure to improve one's position at trial can result in the imposition of penalties.

One of the keys to the success of our Michigan mediation procedure, as contrasted with the timing in S. 2760, is the fact that mediation in Michigan comes into play after discovery is completed or well underway. Our experience has shown that only at this stage will the parties and their counsel be in position to realistically and effectively evaluate their case.

Let me quickly share some of the results of our system with you. In 1985, in Wayne County, we mediated 9,500-some-odd cases. Of these cases, 47 percent settled before mediation or the parties accepted mediation award; 17.5 percent of the cases had a valuation of under $10,000 and were remanded to a lower court. Of these, it is our experience that a very high percentage of them either settled or are dismissed voluntarily; 35.5 percent of the cases were rejected by one or both of the parties and referred to trial. Experience shows us, although we do not have statistics, that of these approximately 90 percent eventually settle within 10 to 20 percent of the mediation valuation.

Our system has worked well enough to be adopted by the U.S. District Court for the Eastern District of Michigan, where most tort cases are referred to mediation before trial. Before the mediation, our backlog in Wayne County, the time between filing and trial was 60 months. Now that time is at 41 months and dropping. Time to disposition has been improved by 18 months.

I commend this system to you as an excellent alternative dispute mechanism that functions within any judicial framework. I thank you for the rare opportunity of appearing before you.

[The prepared statement of Mr. Scott follows:]

STATEMENT OF JOHN E. S. SCOTT
TO SENATE JUDICIARY COMMITTEE, HEARINGS ON S. 2760
SEPTEMBER 10, 1986

I appreciate the invitation by the Committee to appear and testify concerning S. 2760. I have been asked, as a trial lawyer with experience in Alternative Dispute Resolution to comment on Title II of S. 2760 relating to Expedited Product Liability Settlements. I have also been asked, because of my experience as a trial lawyer in Detroit, to relate to the Committee my experience with our mediation procedure used in civil cases in Michigan and particularly Wayne County.

My perspective is that of a practicing trial lawyer who has represented manufacturers and sellers of a wide variety of consumer products in product liability actions. I have actively participated in the Wayne County Mediation program, both as a mediator and as a practitioner, since its inception. Additionally, I have been active in the field of Alternative Dispute Resolution generally.

S. 2760

I offer the following comments to the Committee based upon my review of the Expedited Product Liability Settlement procedure of S. 2760. Although, I believe there are many problems with this provision, I have four principal areas of criticism.

A. MAKING THE OFFER-TIMING

The Bill provides that an offer of settlement may be made by a claimant at the time of filing his or her Complaint and by a defendant within 90 days after service of the Complaint. In my judgment, this feature alone will result in the procedure being used rarely, if at all. Unfortunately, the provision encouraging a claimant to make an offer of settlement at the same time the Complaint is filed is simply not realistic. In the vast majority of cases filed, neither the plaintiff nor his counsel has focused on the total damages allegedly suffered at the time they file the Complaint. While the plaintiff may be reasonably certain of his past economic damages, future economic damages are not known, nor capable of being ascertained at the time the Complaint is filed. Additionally, neither plaintiff nor his counsel has usually focused on non-economic or "dignitary" losses. Consequently, if an offer is even made, it will be unrealistically high, resulting in its rejection.

The same problem exists with requiring defendants to make an offer within 90 days of the service of the Complaint. A defendant will not have had sufficient time to evaluate its potential liability, much less to collect and analyze all the evidence relating to past and future economic losses. Thus, the laudatory purpose of the procedure, an expedited settlement, will actually be hindered.

B. VALIDITY OF OFFER

The provisions relating to referring disputes on the validity of the offer are likewise capable of frustrating, not aiding, in the expedited handling of claims. Firstly, no guidelines for what is a "valid" offer are set forth. Seemingly, the trial court will be left on its own to determine what constitutes a valid offer. Is it one which is simply within the limits of the Bill or is it something else? In practice, widely varying standards may be applied and one object of S. 2760 - uniformity - will be lost.

Secondly, the provision for reference to the court will have the result of increasing litigation and its resulting burden on the parties, rather than reducing it. As I read this section, it places the judge in the position of having to hear and consider evidence, perhaps extensive, before trial and then usurping the function of the jury to determine whether or not a valid offer has been made. This will be unacceptable to most parties and will simply result in the procedure not being utilized.

C. PAYMENT OF NET ECONOMIC LOSS

The provision permitting modification of a settlement agreement is simply not workable. Firstly, it calls for a judicial determination of the right to a change, thus reviving a case once dismissed and, again, increasing the number of lawsuits which already clog our courts.

Secondly, the aim of any settlement is just that - a settlement, which puts a reasonable value on the case and is final and terminates the uncertainty of future potential liability for a manufacturer or seller. There is no incentive to a defendant to settle a claim when the threat of the case being reopened exists.

D. REIMBURSEMENT

The principal problem with this section lies with the procedure for determination of comparative fault. Here again, the result will be to increase litigation, not expedite settlement. Extensive judicial time will be necessary to resolve the inevitable disputes relating to contribution. Additionally, most of the defendants, or potentially liable parties, will not be willing to submit this issue to a judge, as opposed to a jury. Thus, in many cases, defendants will simply choose not to utilize the procedure.

In sum, I believe the expedited settlement procedure is cumbersome - fraught with uncertainties - will not be uniform in its application - and will have the opposite effect of the laudatory aim ~~that~~ which is intended.

In my judgment, one principal fundamental factor in a successful Alternative Dispute Resolution procedure, whether it be arbitration, mediation, mini trials or summary jury trials, is the involvement of a third party (or parties) in the process, whose function it is to aid - push if you will - the parties to resolve the dispute. Parties to litigation are in an adversary position. A procedure that essentially puts the burden on the parties alone to make it work will only be marginally successful. It is the dynamics of the involvement of a third party that is the key to a successful Alternative Dispute Resolution process.

MICHIGAN MEDIATION SYSTEM

In Michigan, we now operate under a Court Rule adopted by our Supreme Court which mandates that all civil cases pending in our courts of general jurisdiction be mediated under a prescribed procedure. I have appended a copy of that Rule to my testimony. That procedure is modeled after a settlement mechanism first adopted in our most popular County - Wayne - in an effort to alleviate its crowded docket and the then five-year delay in the presentation of most cases.

Simply stated, based on oral presentations and written statements by counsel, a panel of experienced litigators evaluates each case and places a settlement figure on it. Cases which reject the mediation evaluation then proceed to a judge - conducted settlement conference on the scheduled trial date, with trial set to follow for cases which remain unresolved. Rejection of the valuation figure, coupled with a failure to improve one's position at trial, can result in the assessment of penalties.

The process is designed and has worked to minimize the costs, yet maximize the benefits to the litigants, the bar and the Court.

The Michigan Court Rule allows each Court unit to devise its own method of administering a mediation procedure. The most successful has been the Wayne County experience. In Wayne County, a non-profit Mediation Tribunal Association was created to handle daily administration of the program. The Board of Directors of this Corporation is composed of the Chief Judge of Circuit and two experienced litigators, one representing the plaintiffs' bar, and one the defense bar. The program is financed completely by modest fees charged to the parties who are required to participate in the process. Mediators are selected by the Board of

Directors. Minimal requirements, such as five years' experience, ensure that panel members will be knowledgeable litigators.

Each case is scheduled for hearing and the parties prepare mediation statements. They then appear to present their arguments before a panel of experienced litigators - a neutral chairperson, a plaintiff's lawyer and a defense lawyer. The whole procedure takes approximately 30 minutes.

The entire format is settlement oriented. In practice, it operates as a settlement session as opposed to an adversarial proceeding. No testimony is presented, but physical evidence, such as photographs and diagrams, are shared with the panel. The panel then speaks with each attorney privately to ascertain whether there is any common ground. It then places a value on the case for settlement purposes.

The value placed by the panel can then be accepted or rejected by the parties. If accepted by all parties, the case is closed. If rejected, the case proceeds to trial. Nothing that took place in the mediation process is admissible at the trial, thus encouraging a full and frank discussion at the mediation proceeding.

A penalty provision is included to encourage acceptance. Rejection of a panel's unanimous evaluation by one or both sides can result in court-ordered awards of costs and attorneys' fees at the local prevailing rate for each trial day if the subsequent court verdict does not improve upon the mediation award by at least ten (10%) per cent. The mechanism is not designed to coerce the parties to accept inequitable evaluations, or to waive their right to trial. Rather, it is designed to defray a party's legal expenses incurred at trial when the opposing party fails to assess the value of the case accurately.

The process is not without disadvantages. It clearly is settlement oriented and, thus, has no mechanism for dealing with frivolous or questionable liability cases other than by a low award. It does not permit a ruling of no liability, thus penalizing the manufacturer or seller in a products liability case who wants to defend a product in court. It does have an opt-out provision by request to the Chief Judge. However, as a practical matter, it is rare for a case to be exempted from the process. Additionally, as contrasted with S. 2760, the process is deliberately designed to come into play after discovery is completed. Cases are typically scheduled for mediation in the 27th month after their filing. This is because our experience has demonstrated that only at this stage will the parties and their counsel be in a position to realistically and effectively evaluate their position, thus making the process workable. The time for cases to reach mediation varies in different parts of the State where the dockets are less crowded, but it is expected that discovery will be complete. The rule does have a provision which permits early mediation, upon application to the Court, in special circumstances such as an elderly claimant.

The system is not well suited to complex cases, however, because it does not permit the kind of careful deliberation necessary to evaluate these cases. As a result, many parties involved in the more complex cases request the appointment of mediators who generally receive more compensation from the parties than the conventional panel. These special mediation panels are usually composed of experts in the subject matter of the case and spend considerably more time in the evaluation process.

In the vast majority of routine cases, however, the system works quite well. In 1985, 9,518 cases were submitted to mediation. Forty-seven (47%) per cent of these cases, or 4,509 cases, were settled either before or at the mediation by acceptance by all parties. Because they received evaluations in amounts less than $10,000, 17.5% of these cases, or 1,667 cases, were remanded to a lower court. Although no figures are available, experienced lawyers believe that a very high percentage of these cases do settle as a result of the amount of the mediation award. The remaining 35.5% of these cases, or 3,342 cases, in which awards were rejected by one or both parties, were returned to the Circuit Court for disposition. Of these cases, 90% settled within ten to twenty per cent of mediation, according to the mediation officials.

The system has worked well enough in our State Court to cause the United States District Court for the Eastern District of Michigan to adopt it and refer most of the tort cases pending in that Court for mediation before trial.

What is the benefit to the parties? Before the system, we had in Wayne County at least a 60-month delay between the filing of a Complaint and the time of trial date. Now, that interim period is 41 months and narrowing. The disposition time for the vast majority of the cases has been improved by a factor of 18 months.

In Wayne County, a major Alternative Dispute Resolution operates with the existing system to settle cases. It is an "expedited settlement" procedure that works for all cases, including products liability cases.

Thank you for the opportunity of appearing before you and testifying.

APPENDIX "A"

RULE 2.403 MEDIATION

(A) Scope and Applicability of Rule. A court may submit to mediation any civil action in which the relief sought consists of money damages or division of property.

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for mediation by written order no earlier than 91 days after the filing of the answer

(a) on written stipulation by the parties,

(b) on written motion by a party, or

(c) on the judge's own initiative.

(2) Selection of an action for mediation has no effect on the normal progress of the action toward trial.

(C) Objections to Mediation.

(1) To object to mediation, a party must file a written motion to remove from mediation and a notice of hearing of the motion and serve a copy on the attorneys of record and the mediation clerk within 14 days after notice of the order assigning the action to mediation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise.

(2) A timely motion must be heard before the case is submitted to mediation.

(D) Mediation Panel.

(1) Mediation panels shall be composed of 3 persons.

(2) The procedure for selecting mediation panels must be provided by local administrative order, and may set minimum qualifications for mediators.

(3) A judge may be selected as a member of a mediation panel, but may not preside at the trial of any action in which he or she served as a mediator.

(E) Disqualification of Mediators. The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge.

(F) Mediation Clerk. The court shall designate the clerk of the court, the court administrator, the assignment clerk, or some other person to serve as the mediation clerk.

(G) Scheduling Mediation Hearing.

(1) The mediation clerk shall set a time and place for the hearing and send notice to the mediators and the attorneys at least 28 days before the date set.

(2) Adjournments may be granted only for good cause, in accordance with MCR 2.503.

(H) Fees.

(1) Within 14 days after the mailing of the notice of the mediation hearing, each party must send to the mediation clerk a check for $75 made payable in the manner specified in the notice of the mediation hearing. However, if a judge is a member of the panel, the fee is $50. Only a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims. The mediation clerk shall arrange payment to the mediators.

(2) If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the mediators.

(3) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the mediation panel will then make separate awards for each claim, which may be individually accepted or rejected.

(I) Submission of Documents.

(1) At least 7 days before the hearing date, each party shall submit to the mediation clerk 3 copies of documents pertaining to

the issues to be mediated and 3 copies of a concise brief or summary setting forth that party's factual or legal position on issues presented by the action. In addition, one copy must be served on each attorney of record.

(2) Failure to submit these materials to the mediation clerk within the above-designated time subjects the offending party to a $60 penalty to be paid at the time of the mediation hearing and distributed equally among the attorney-mediators.

(J) Conduct of Hearing.

(1) A party has the right, but is not required, to attend a mediation hearing. If scars, disfigurement, or other unusual conditions exist, they may be demonstrated to the panel by a personal appearance; however, no testimony will be taken or permitted of any party.

(2) The rules of evidence do not apply before the mediation panel. Factual information having a bearing on damages or liability must be supported by documentary evidence, if possible.

(3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. The mediation panel may request information on applicable insurance policy limits and may inquire about settlement negotiations, unless a party objects.

(4) Statements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding.

(K) Decision.

(1) Within 14 days after the hearing, the panel will make an evaluation and notify the attorney for each party of its evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2) The evaluation must include a separate award as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule all such claims filed by any one party against any other party shall be treated as a single claim.

(L) Acceptance or Rejection of Evaluation.

(1) Each party must file a written acceptance or rejection of the panel's evaluation with the mediation clerk within 28 days after service of the panel's evaluation. The failure to file a written acceptance or rejection within 28 days constitutes acceptance.

(2) There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the 28-day period, at which time the mediation clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

(3) In mediations involving multiple parties the following rules apply:

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

(b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if all opposing parties accept. If this limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject.

(c) If a party makes a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in that amount, which includes all fees, costs, and interest to the date of judgment.

(2) In a case involving multiple parties, judgment shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.

(N) Proceedings After Rejection.

(1) If all or part of the evaluation of the mediation panel is rejected, the action proceeds to trial in the normal fashion.

(2) The mediation clerk shall place a copy of the mediation evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. In a nonjury action, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment.

(3) If the mediation evaluation of an action pending in the circuit court does not exceed the jurisdictional limitation of the district court, the mediation clerk shall so inform the trial judge.

(O) Rejecting Party's Liability for Costs.

(1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

(2) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation.

(3) For the purpose of this rule, actual costs include those costs taxable in any civil action and a reasonable attorney fee as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.

(4) Costs shall not be awarded if the mediation award was not unanimous.

[Amended January 25, 1985.]

Note

MCR 2.403 corresponds to GCR 1963, 316. There are a number of revisions.

Subrule (A) deletes the authorization for a separate procedure for the Third Judicial Circuit. However, one of the key features of the third circuit rule is adopted for statewide use. Under subrule (L)(1), failure to file an acceptance or rejection of a mediation award within the time provided constitutes acceptance of the award, unlike the practice under GCR 1963, 316.6(H)(1), which made failure to file an acceptance the equivalent of rejection. The time for accepting or rejecting the award is set at 28 days.

Subrule (C)(2) is changed from the corresponding language of GCR 1963, 316.3(B). Under the latter provision, a motion to remove a case from mediation stayed mediation proceedings. Subrule (C)(2) does not include the stay provision, but says instead that such a motion must be heard before the case is submitted to mediation.

Subrules (F)-(O) are reorganized and rewritten, although only a few substantive changes are included.

First, subrule (H)(1) does not direct that the checks by which the parties pay the mediation fee are to be payable to the attorney mediators, as had GCR 1963, 316.6(C)(1). Rather, the checks are to be made payable in the manner specified in the mediation notice. In some courts the mediation program might be arranged so that it is more convenient to have the checks payable to the mediation clerk or the court clerk.

Subrule (I) not only requires that the parties submit documents relating to the issues to be mediated, but also that they supply briefs or summaries setting forth their legal or factual positions on the issues. Failure to submit either document to the mediation clerk at least 7 days before the hearing date subjects the party to the cost penalty imposed by subrule (I)(2). Under the corresponding provision, GCR 1963, 316.6(E), the penalty provisions applied only to the documents. Submission of the brief or summary was optional.

Under GCR 1963, 316.6(F)(3), the mediators were not permitted to inquire into settlement negotiations. Subrule (J)(3) modifies the prohibition. The mediators may inquire unless a party objects. This is similar to the provision of the former third circuit local rule 403.12.

Several provisions of the rule are modified to deal with the situation in which there is more than one party on a side. Subrule (H)(1) makes clear that only a single fee is required of each party even where there are counterclaims, cross-claims, or third-party claims. Second, subrule (K)(2) specifies that the evaluation must include a separate award as to each cross-claim, counterclaim, or third-party claim, although all claims between any two parties are treated as a single claim. Finally, under subrule (L)(3), parties are permitted to accept some, but less than all, of the individual awards. Judgment will be entered as to those pairs of parties who have accepted. See subrule (M)(2). However, a party has the option of making a "conditional" acceptance of the entire award, specifying that if fewer than all of the opposing parties accept, the party making the conditional acceptance should be taken as rejecting as to all of them. A party may be willing to accept the award in its entirety if that has the effect of eliminating the need for a trial. However, if the case is going to be tried anyway, the party may prefer to have a trial as to all opposing parties. For the purpose of applying the cost provisions, a party making a conditional acceptance is treated as having rejected the award as to those opposing parties who accepted it. See subrule (L)(3)(c).

Subrule (N)(2) provides that in a nonjury case not only must the evaluation itself be sealed until the judge has entered judgment, but the parties are forbidden to tell the judge about the mediation award. Compare GCR 1963, 316.6(H)(2).

Finally, subrule (O)(4) adopts the principle, found in the third circuit local rule 403.15, that where the mediation panel's award is not unanimous, costs are not to be awarded against a rejecting party. Subrule (K)(1) requires that if the award is not unanimous, it must so indicate.

The [January 25, 1985] amendment of MCR 2.403(N)(2) deletes the requirement that the mediation clerk return copies of mediation documents to the attorney who submitted them.

The [January 25, 1985] amendment of MCR 2.403(O)(1) revises the language regarding the liability for costs of a party who rejects a mediation evaluation, correcting an unintended change from GCR 316.7(b). The rejecting party is liable for costs unless that party improves its position by at least 10 percent (unless the other party has rejected, in which case a party is liable for costs only if the opponent improves its position by at least 10 percent).

Senator McConnell [presiding]. Thank you very much. Mr. Few.

STATEMENT OF KENDALL FEW

Mr. Few. Mr. Chairman, I am Kendall Few. I am a trial lawyer from Greenville, SC, many of my illustrious ancestors having come from Alabama and many having come from the great State of Kentucky.

I am here as an individual trial lawyer who has been engaged in the past 20 years in the actual trial of products liability cases, 8 years as a defense lawyer, 1 year as a State court judge, and for the last 11 years as a plaintiff trial lawyer.

In May of this year I was requested by Senator Hollings of South Carolina to appear before the Senate Commerce Committee and testify there. This matter has troubled me so much since that time that I have spent the major portion of my life, uncompensated and unreimbursed, in the pursuit of what I believe to be an unquestionably just cause. That cause is the protection of the rights of countless thousands of as yet unknown future victims of defective and unreasonably dangerous products, young children who will be seriously injured, killed, or deformed for life by products which could have been rendered reasonably safe by the exercise of due care on the part of the manufacturer, factory workers who will be maimed or killed by industrial machines that have failed to incorporate safety devices and designs that were available and in use since the middle of the 19th century as reflected by the public records of the U.S. Patent Office here in Crystal City, VA, farmers who will lose their arms, legs and lives to unreasonably unsafe machinery, grotesquely disfigured burn victims, catastrophically injured children, quadraplegics, distraught widows, bewildered orphans, all of whom will be victims, first of the callous insensitivity of the product manufacturers and, second, if this outrageous bill is not defeated by the Congress of the United States, victims again to the insatiable greed of the liability insurance industry which, according to the Government Accounting Office, during the last 10 years made profits of $79 billion and projected during the next 5 years to have profits of $90 billion.

I do not know, Mr. Chairman, whether I come within the definition of scholar as previously used by Senator Kasten, but I am the author of two pamphlets which I hope have been passed up to both of you: First, entitled "Fifteen Fallacies of Product Liability Reform" and, second, entitled "History and Status of Products Liability Reform."

It is my purpose in the limited time that I am here today to convince this committee, if it can be done, Senator McConnell, that, first of all, there is absolutely no justification for this intrusion into the doctrine of States rights which I have believed in since I was a tender chap at the age of 9 in 1948 when my senior Senator from the State of South Carolina, whom I have the utmost respect and have voted for on numerous occasions and hope to have the opportunity to vote for again, ran for the exalted office of President of the United States of America on a States rights platform and has championed that cause thereafter in the Halls of the Senate of the

United States, and we in South Carolina, on behalf of the future products victims of South Carolina trust that he will continue to do so in the future.

The second, the "History and Status of the Products Liability Reform," Senator McConnell, I would like to ask you, sir, if you would read, because it tells you just exactly what this bill does. And those of you who have been taking care of the Nation's business here in Washington and have not for the past 20 years, like I have, had the opportunity to actually represent victims in the court rooms of the United States, would be interested to turn to page 22 and see just exactly what your bill will do.

First of all, I would like to point out—this is not your bill, Senator, but the bill before your committee——

Senator McCONNELL. No, I would go way further than the bill, actually.

Mr. FEW. If you look on page 22 of the pamphlet entitled, "History and Status of the Product Liability Reform"—I put "reform" in quotes—and I see my light is on, so you tell me to stop whenever you think I ought to.

Senator McCONNELL. You might move along as rapidly as possible.

Mr. FEW. I will just make this one point: The collateral source rule which was adopted—I am not a scholar, but it was adopted in England in 1787 and in 1832 by the Supreme Court of the United States and 1854 by the Supreme Court of New York and in 1860 by the Court of Appeals of Ohio and 1869 by the Supreme Court of New Hampshire, in 1871—I have a pamphlet on that which I will pass up later—will be abolished by this bill, and the defendants, the manufacturers of defective and unreasonably dangerous products will get the full value of the life insurance, Senator McConnell and Senator Heflin, the life insurance that the product victim has purchased on his own life will be credited against his—not only his life insurance, his hospital insurance, his accident insurance, and anything that he is entitled to recover under State or Federal law, and that would include food stamps and welfare, whether he applied for them or not.

And I would like for you to tell the people of the United States of America that this is fair, and I would like for you to read these eight typical illustrations and see how this man here in No. 1, who had $200,000, a burn victim who had $200,000 of economic damages, with $150,000 of hospital bills, gets absolutely nothing under this bill.

I appreciate very much the opportunity to appear, and, Senator McConnell, I hope you will ask me some of the questions that you asked Senator Kasten earlier. And, Senator Heflin, you asked several questions that I am prepared to respond to that were not responded to by Senator Kasten.

Thank you very much.

[The prepared statement of Mr. Few and documents referred to follow:]

TESTIMONY OF J. KENDALL FEW

Post Office Box 10085
Greenville, South Carolina 29603
(803) 232-6456

BEFORE THE SENATE JUDICIARY COMMITTEE, SEPTEMBER 10, 1986 IN OPPOSITION TO THE PROPOSED PRODUCT LIABILITY "REFORM" ACT, SENATE BILL 2760, 99th CONGRESS, SECOND SESSION

Senator Thurmond, Members of the Judiciary Committee:

I am J. Kendall Few, a trial lawyer from Greenville, South Carolina.

For the past 20 years I have been directly involved in the trial of products liability cases, first as a defense lawyer, next as a state court judge and last as a plaintiff's lawyer.

I appear here as a private citizen, expressing my own individual views. In May, I was asked to testify on this proposed Bill before the Senate Commerce Committee. Since that time, I have been continuously involved in support of a cause which I believe to be unquestionably just: the preservation of the rights under existing law of countless thousands of future victims of defective and unreasonably dangerous products:

Young children who will be seriously injured, killed or deformed for life by products which could have been rendered reasonably safe by the exercise of due care on the part of the manufacturer.

Factory workers who will be maimed or killed by industrial machines which lack elemental safety designs and devices long since available to the product manufacturer.

Farmers who will lose their arms, legs and lives to unreasonably unsafe farm machinery.

Grotesquely disfigured burn victims, catastrophically injured children, quadriplegics, distraught widows and impoverished orphans, all of who will be victims, first to the callous indifference of product manufacturers to public safety and, second -- if this outrageous Bill passes --

victims again to the insatiable greed of the liability insurance industry.

In behalf of these victims, my purpose here is to convince this Committee:

First, that there is no justification for this attempt to deprive the American public of their rights to equal justice, trial by a jury, and just compensation;

Second, that this Bill is inconsistent with the traditional rights of the states to establish judicial policy for the health and safety of its citizens;

Third, that this Bill is ill-conceived and poorly drafted with no apparent understanding of the injustice that will result in individual cases.

Supplementing my testimony are two pamphlets, the first entitled, "Fifteen Fallacies of Products Liability 'Reform'" [Attached as Exhibit A], which examines the claimed justification for this proposed legislation; and the second, entitled, "History and Status of Products Liability 'Reform'" [Attached as Exhibit B], which outlines the legislative history of this Bill, describes its principal provisions, and explains the practical effects of its application in eight typical hypothetical products liability cases.

Adoption of this Bill as currently drafted will accomplish the following undesirable results:

1. Abolition of the collateral source rule will, in many cases, effectively eliminate recovery of economic loss [See Exhibit B, page 22, Illustration No. 1].

2. Abolition of joint and several liability for non-economic damages will increase the number of parties and make an unmanageable and unnecessarily expensive free-for-all out of every products case [See Exhibit B, page 27, Illustration No 7].

3. Caps on damages will effectively deprive the seriously injured product victim of his right to recovery of

just compensation [See Exhibit B, Illustrations 2, 3, and 4, pages 23-25].

4. Abolition of the product seller's liability for breach of implied warranty and for sale of defective and unreasonably dangerous products will deprive many product victims of any recovery whatsoever [See Exhibit B, page 26, Illustration No 6].

5. Periodic payment of future damages will result in an unending controversy in every case requiring future medical care [See Exhibit B, page 25, Illustration No. 5].

6. The ambiguous language in this Bill will bog our courts in a quagmire of appellate litigation.

7. In summation, this Bill is unjustified, ill-conceived, poorly drafted and, if enacted, will result in an absolute disaster to the rights of the people and to our entire system of civil justice.

EXHIBIT A

FIFTEEN FALLACIES OF PRODUCTS LIABILITY "REFORM"

ABSTRACT.

Products liability "reform" is supported by manufacturers of defective products and the liablity insurance industry. As the ones who stand to gain from the limitation of the rights of their victims, they have built their proposed "reforms" on a series of fifteen basic fallacies:

(a) The Fallacy of the Insurance "Crisis".

(b) The Fallacy of the "Litigation Explosion".

(c) The Fallacy of Excessive Jury Awards.

(d) The Fallacy of Lack of Uniformity.

(e) The Fallacy of Liability Without Fault.

(f) The Fallacy of Liability for Unforeseeable Injury.

(g) The Fallacy of Lower Litigation Costs.

(h) The Fallacy of Expediting Products Cases.

(i) The Fallacy of Double Recovery.

(j) The Fallacy of Windfalls in Future Damages Awards.

(k) The Fallacy of the "Deep Pocket".

(l) The Fallacy of Excessive "Transaction Costs".

(m) The Fallacy of Fairness.

(n) The Fallacy of "Reform".

The greatest fallacy of all is the use of the word "reform". Rather than reform, these proposals will bring chaos and confusion to our courts and despair to the lives of seriously injured victims of defective products. This pamphlet describes these fifteen fallacies and the adverse effects of pending products liability "reform" proposals on our current system of American justice.

(a) The Fallacy of the Insurance "Crisis".

In the report of the Administration's "Tort Policy Working Group", they state that "the property-casualty industry in the past two years has suffered significant underwriting losses."[1] The truth of the matter is shown in a recent report of the United States General Accounting Office[2] which concluded that, during the past 10 years, the property/casualty insurance industry "had a net gain of about $75 billion"[3] and was expected to experience a "net gain before taxes of more than $90 billion over the years 1986-1990."[4] The only crisis that the insurance industry is really suffering is a "credibility crisis."[5]

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[1] See, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, p. 1 (February, 1986).

[2] See, Statement of John C. Finch, Senior Associate Director, General Government Division, Before the Subcommittee on Oversight, Committee on Ways and Means of the House of Representatives on the Profitability of the Property/Casualty Insurance Industry, pp. 1, 4, 7 (April 28, 1986).

[3] Id. at page 4.

[4] "Available industry estimates show that over the next five years the [property/casualty insurance] industry expects substantial net gains. Our calculations, made from the industry estimates, indicate an expected net gain before taxes of more than $90 billion over the years 1986-1990."

[5] See, also, Bellotti, et al., "An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance", prepared by the Attorneys General of the States of Massachusetts, California, North Carolina, Texas, West Virginia and Wisconsin for the National Association of Attorneys General. This extensive report contains several conclusions, including: "Conclusion #1: The property/casualty industry is in adequate and improving financial condition"; and "Conclusion #4: Changes in the civil justice system are not likely to solve the current or future problems in availability and affordability of liability insurance."

Additional evidence of the fallacy of this alleged insurance crisis can be found in what Wall Street analysts call "the long bull market in property and casualty stocks."[6] Since June of 1984, the stock price index for property and casualty insurance stocks has almost doubled, outperforming the Standard and Poor 500 Stock Index by a substantial margin.[7] Wall Street analysts are predicting "explosive industry-wide earnings gains" as a virtual certainty in 1986.[8] One elelment in their predicted "bullish scenario"[9] is the monumental rate hikes of 1985.[10] Another is the expected boost in bulging insurance industry earnings from pending "tort reform proposals."[11]

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[6] Curran, "Bargains Beckon in Insurance", Fortune Magazine, p. 217 (August 4, 1986). See, also, "Yoo-Hoo, Big Blue", Barron's, p. 30 (June 2, 1986), which shows, "The 50 largest institutional holdings" and the "top 50 net purchases" by institutions as including at least four large liability insurance companies: Firemans Fund, St. Paul Companies, Chubb Corporation, and Kemper Corporation."

[7] Curran, supra, Note 6, p. 217. "The two year bull market in property and casualty stocks is far from over, analysts say...." Id.

[8] "Salomon Brother Analysts...are positively bubbly about the long term earnings outlook for property and casualty insurers. In a recent review of First Quarter results, they predict that 'explosive industry-wide earnings gains are vitually assured for 1986' because of commercial-rate strategies already in place." Henriques, "A Look at Insurers", Barron's, p. 44 (August 4, 1986).

[9] Curran, supra, Note 6, p. 217.

[10] Referring to "premium rate increases averaging 45% on traditional commercial policies in 1985", a recent Fortune Magazine article states that "analysts insist the earnings outlook for major insurers remains unusually bright." Curran, supra, Note 6, page 220.

[11] "Analysts' favorites run the gamut from the primary insurers who write the policies to reinsurers who take a
(Footnote Continued)

(b) The Fallacy of the "Litigation Explosion".

The Administration's Tort Policy Working Group claims that "in the past decade there has been a veritable explosion of tort liability in the United States."[7] However, a recent study by the National Center for State Courts found no evidence of a "litigation explosion" in state trial courts in the United States:[8]

> "Careful examination of current available trial court data relating to tort, contract, real property rights and small claims cases, from a representative group of state courts, provides no evidence to support the existence of a national 'litigation explosion' in state

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(Footnote Continued)
piece of the action. [A] Salomon Brothers [analyst] thinks American International Group stands to be a prime beneficiary of the trend toward the kind of tort reform that limits the size and type of awards. 'This company writes esoteric coverage,' he says. 'Liability insurance for skating rinks, day care centers, ski lifts -- just the type of business that will be helped by tort reform.' He expects AIG to earn...a gain of 73% over 1985, as higher policy prices reach the bottom line. In 1987 he expects a 35% boost...." Curran, *supra*, Note 6, p. 220. See, also, "The Bullish Case for Casualty Stocks", *Barron's*, p. 13 (July 7, 1986), which states: "Generally, we think tort reform is good for the insurance industry....We, ourselves, harbor a few reservations on the subject -- if tort reform brings about the desired result, it could encourage immoderate insurance company behavior at some point....".

[7] See, "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis of Insurance Availability and Affordability", page 2 (February, 1986). In his introduction of the Administration bill (Kasten Amendment), Senator Kasten also referred to this alleged "products liability explosion". See *Congressional Record - Senate* S-5107 (April 30, 1986).

[8] See, "A Preliminary Examination of Available Civil Criminal Trend Data in State Trial Courts for 1978, 1981 and 1984", produced by the Court Statistics and Information Management Project of the National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23187-8798 (April, 1986).

trial courts during the 1981-1984 time period."[9]

According to this study, the increase in tort litigation roughly approximates the increase in total population:

> "...For the entire period 1978-84, total tort filings increased by nine percent, but the population also increased by eight percent."[10]

This study concludes with the observation that "the often cited litigation explosion...appears to be exaggerated...."[11]

Another study has concluded that the number of lawsuits filed per capita has remained constant since 1959.[12]

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[9] See page 1 of study cited in Footnote 8 above. To the same effect, see "The Assault Upon Personal Injury Lawsuits: A Study of Reality vs. Myths", Public Citizen, Washington, D.C., p. 1 (August, 1986), which concludes as follows: "Available data indicate that there has not been a dramatic increase in tort cases filed in state courts, where approximately 95% of these lawsuits are filed. Data for the years 1978, 1981 and 1984 show that for state courts representing about 35% of the U.S. population, tort filings have paralleled growth in population." See, also, Bellotti, et al., "An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance", pp. 21-36, a Report by the Attorneys General of the States of Massachusetts, California, North Carolina, Texas, West Virginia and Wisconsin prepared for the National Association of Attorneys General (May, 1986), which concludes that "the evidence shows no vast or explosive increases in claims or payments to victims."

[10] See page "ADD ONE" of study cited in Footnote 8 above.

[11] See page "ADD TWO" of study cited in Footnote 8 above. "Whatever the explanation, there is no evidence to support the notion of a nationwide increase in lawsuits in the state trial courts between 1981-84." See Part II, second page, of study cited in Footnote 8 above.

[12] Statement of Gustave Shubert, Director, Rand Institute for Civil Justice, before the National Conference of State Legislatures, Denver, Colorado, January 4, 1986.
(Footnote Continued)

(c) The Fallacy of Excessive Jury Awards.

In introducing the Administration's proposed Product Liability Reform Act on April 30, 1986, Senator Kasten said:

> "...The provisions in this legislation result from the report of the President's Tort Policy Working Group issued this past February...
>
> "The working group found that in the past decade there had been a veritable explosion in tort liability in the United States. Between 1974 and 1985..., *the average jury verdict in product liability cases increased from under $400,000 to over $1.8 million*."[13]

When questioned about these statistics in Senate Commerce Committee hearings by Senator Ernest F. Hollings of South Carolina, Assistant Attorney General Richard K. Willard admitted that one of the primary sources for the working group's "statistics" was Jury Verdict Research, Inc., of Solon, Ohio.[14] Mr. Willard further admitted that

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(Footnote Continued)
Source: National Insurance Consumer Organization Memo, page 2, entitled, "Insurance Industry Tall Tales." National Insurance Consumer Organization, 121 N. Payne Street, Alexandria, Virginia 22314.

[13] *Congressional Record* - *Senate* S-5107 (April 30, 1986).

[14] Concerning this source, see National Insurance Consumer Organization memo entitled, "Insurance Industry Tall Tales" which states in part as follows: "The figures disseminated by the insurance industry are the average of awards to plaintiffs reported by Jury Verdict Research, Inc., of Solon, Ohio, which collects cases it learns about through a clipping service it subscribes to, through legal publications such as the ATLA Law Reporter, through reports directly from plaintiff's lawyers, and through reports by a small fraction of court clerks. Since the popular press, understandably, report only the big cases, and since plaintiff's lawyers report only their great victories, the average of awards to plaintiffs collected by JVR is far higher than the average of awards to all plaintiffs. Moreover, JVR's data do not include defense verdicts, which consistently account for more than half...of all jury
(Footnote Continued)

there were "limitations on the methodology" used by Jury Verdict Research,[15] that their statistics were not scientific,[16] and that their statistics are gathered from newspaper clippings and other similar sources:

> "Senator Hollings: Well, how do they gather it? That is what I'm asking.
>
> "Mr. Willard: They gather it from people who write in and report it to them, from newspaper clippings, from a variety of services.
>
> "Senator Hollings: Come on now, you are an Attorney General. You are not going to come up and testify about newspaper clippings.
>
> "Mr. Willard: Well, Senator, we do not use Jury Verdict Research, Inc., statistics as being accurate as to absolute data as to average jury verdicts."[17]

Despite this admission, President Reagan told the American Tort Reform Association ten days later that, "Between 1975 and 1985, the average award in a products liability case quadrupled, to some $1.8 million."[18]

Whether the President knew better, or was misinformed, history does not yet record. Whichever is true, it is clear to us that products liability "reformers" have used their

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(Footnote Continued)
verdicts. Finally, JVR includes in its database both verdicts that were remitted by the judge...and verdicts that were later reversed on appeal."

[15] See May 20, 1986, Transcript of Senate Commerce Committee, Subcommittee on Consumer Affairs Hearing, p. 25 (15-16).

[16] See Transcript, supra, Note 15, pp. 27(25) - 28(2).

[17] See Transcript, supra, Note 15, p. 27(3-13).

[18] See release of the White House Office of the Press Secretary, "Remarks by the President to the American Tort Reform Association", page 2 (May 30, 1986).

concocted statistics much as a drunken man uses lamp posts: "for support rather than illumination."[19]

The fact is, there are no accurate, comprehensive statistics on jury verdicts in products cases.[20] In South Carolina, we have taken steps to fill this void by establishing the South Carolina Jury Verdict Research Project.[21] This project is being conducted by the University of South Carolina School of Law and will catalog and report all jury verdicts in both state and federal courts in South Carolina for the past ten years. A preliminary feasibility study showed that during the last five years there were no state court products verdicts in the largest county in South Carolina[22] in excess of

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[19] Andrew Lang, The Penguin Dictionary of Quotations, page 230, ¶ 15 (1960). It is also interesting to note that the President also made several references to Mark Twain in his remarks to the American Tort Reform Association. Mark Twain is generally credited with the famous reference to statisticians: "There are liars, damn liars, and statisticians."

[20] The Rand Institute for Civil Justice reports that during the period 1960-1979, the median jury award in products cases was approximately $37,000 in San Francisco County, California, and $115,000 in Cook County, Illinois. See Shanley & Peterson, "Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980", pp. 14-15 (Rand Institute for Civil Justice, 1983).

[21] This study is being conducted under the supervision of Professor Patrick Hubbard of the University of South Carolina School of Law. Statistics are being gathered from the Office of the South Carolina Court Administration, the Federal District Court for the District of South Carolina, and 26 of South Carolina's 46 counties which account for approximately 80% of the cases filed during the 10-year period 1976-1985. Results of this phase of the study are expected to be published during the Fall of 1986.

[22] Greenville County.

$100,000.[23] That's a far cry from an average verdict of $1.8 million.

> "The argument that jury verdicts and expanded tort doctrine contributed to the product-liability 'Crisis' lacks substance. Complaints about the excessive generosity of jurors in products cases collapse under the weight of the available data...."[24]

The same conclusions hold true with respect to punitive damages. Preliminary findings from a recent study by the American Bar Foundation indicate that "punitive damage awards are not routine", are not typically given in excessive amounts, and are rarely awarded in product liability cases.[25]

In addition, under the longstanding common law procedure that Lord Coke refers to as a "wise distribution of power" in which "the judge and jury are a check upon each other",[26] the trial judge has both the power and the duty to set aside or reduce[27] the amount of any verdict which the trial judge considers to be excessive.

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[23] See, Minority Views of Senator Ernest F. Hollings, Report on the "Product Liability 'Reform' Act", Report #99-422 (Calendar #856), page 110 (August 15, 1986). The "South Carolina Verdict Survey" by Jury Verdict Research, Inc., states that jury verdicts in South Carolina are 15% above the national average and that verdicts in Greenville County are 3% above the national average.

[24] Page & Stephens, "The Product Liability Insurance 'Crisis'," 13 Capital Univ. L. Rev. 387, 401 (1984). See, also, Report of the Attorneys General of the States of Massachusetts, California, North Carolina, Texas, West Virginia and Wisconsin, cited in Footnote 7 above, which concludes: "The statistics cited do not show meaningful increases in the number or size of awards, or in the non-economic damage portion of the awards."

[25] Daniels, "Punitive Damages: The Real Story", pp. 60-63, American Bar Association Journal (August 1, 1986): "Product liability cases accounted for less than 5% of all [punitive damages] verdicts at all sites except Los Angeles County, where the percentage was 9.6%." Id. at 61.

[26] "...Nor is it any small merit in this
(Footnote Continued)

> "As a general rule, the fact that the jury...have given excessive damages is ground for a new trial, and the trial court has both the power and the duty, where a new trial is sought on this ground, to determine whether the damages awarded to plaintiff are excessive so as to warrant a new trial."[28]

For those who are interested in learning the whole truth of the matter, there are no less than 21 recent Annotations on the subject.[29]

(d) The Fallacy of Lack of Uniformity.

The three legal theories upon which almost all products cases are based are (a) negligence, (b) breach of implied

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(Footnote Continued)
arrangement...to have the benfit of a trial, in which the judge and jury are a check upon each other; and that this benefit may always be enjoyed....Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled...." Coke's Institutes on the Laws of England, Vol. I, § 234, p. 155b (1628).

[27] On motion for a new trial, the trial judge has the discretion to grant a conditional new trial or a new trial nisi unless the plaintiff agrees to remit [reduce] a portion of the verdict. The practical effect of this procedure is to grant the trial judge with discretionary power to reduce the verdict.

[28] 66 C.J.S., New Trial, § 76, page 241.

[29] See Annotations: 35 ALR4th 441 (1985); 16 ALR4th 238 (1982); 16 ALR4th 736 (1982); 16 ALR4th 1127 (1982); 15 ALR4th 294 (1982); 15 ALR4th 519 (1982); 14 ALR4th 328 (1982); 14 ALR4th 539 (1982); 13 ALR4th 183 (1982); 13 ALR4th 212 (1982); 12 ALR4th 96 (1982); 52 ALR3d 1289 (1973); 49 ALR3d 934 (1973); 47 ALR3d 909 (1973); 47 ALR3d 971 (1972); 46 ALR3d 680 (1972); 46 ALR3d 733 (1972); 12 ALR3d 117 (1967); 12 ALR3d 475 (1967); 11 ALR3d 9 (1967); 11 ALR3d 370 (1967).

warranty, and (c) liability for manufacture and sale of defective and unreasonably dangerous products.[30] The principle that a product manufacturer is responsible for personal injury or death caused by negligent design and manufacture of defective products is uniformly applied in all 50 states.[31] Virtually all states currently impose liability on manufacturers for injuries caused by their negligent failure to warn consumers of the dangerous nature or condition of their products.[32]

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[30] Although § 402A of the Restatement of Torts, 2d is commonly referred to as "strict liability", it only applies to products which, at the time of manufacture or sale, are defective and unreasonably dangerous. Comment i. specifically states that "the rule stated in this section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer...."

[31] Restatement of Torts, 2d, § 395, by the American Law Institute provides that "a manufacturer who fails to exercise reasonable care in the manufacture of a [product]...involving an unreasonable risk of...physical harm...is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied." According to the reporter's notes, this rule, based on MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), "is now all but universally accepted in the United States." See Appendix to Restatement of Torts, 2d, § 395, page 416. "Mississippi was perhaps the last jurisdiction to accept MacPherson". Frumer & Friedman, Products Liability, § 5.03[1], page 26, citing Stone Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966), cert. den. 386 U.S. 912 (1967).

[32] Restatement of Torts, 2d, § 388, adopted by the American Law Institute provides that "one who supplies...a [product] for another to use is subject to liability...for physical harm...if the supplier...has reason to know that the [product] is...likely to be dangerous for the use for which it is supplied, and...fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." For authorities supporting this rule, see Appendix to Restatement of Torts, 2d, § 388, and Frumer & Friedman, supra, Note 31, § 8.

The Uniform Commercial Code, adopted in all 50 states, provides that manufacturers shall be liable to consumers for injuries resulting from breach of an implied warranty that their products are reasonably fit for the purpose for which they are intended.[33] Forty-six of 50 states apply the principle that a manufacturer is liable to the ultimate consumer for personal injury and death caused by the defective and unreasonably dangerous nature of its products.[34]

These are the basic, underlying principles of products liability. To say that there is lack of uniformity here is flagrantly false.

(e) The Fallacy of Liability Without Fault.

One of the unfounded claims most often repeated by the liability insurance industry is that existing products liability law imposes liability without fault.[35] In making this claim, they refer to the provisions of ¶ 402A of the Restatement of Torts, 2d by the American Law Institute which is commonly called "strict liability".[36] Strict liability, however, is not absolute liability.[37] It applies only in cases where the injured consumer proves that the product in question is defective and unreasonably dangerous.[38] How, you may ask, can a product manufacturer who produces a defective and unreasonably dangerous product be without fault?[39] The question answers itself.

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[33] Uniform Commerical Code, § 2-315, provides that "where the seller... has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is ...an implied warranty that the goods shall be fit for such purpose."

[34] This principle is embodied in Restatement of Torts, 2d, § 402A, adopted by the American Law Institute in 1964. Commonly called "strict liability", the principle has been adopted in all states except Massachusetts, North Carolina, Virginia and Wyoming.

[35] In his introduction of the Administration's proposed Product Liability Reform Act, Senator Kasten speaks of a "return to a fault-based liability standard for product designs and warnings." See Congressional Record - Senate (April 30, 1986).

[36] Black's Law Dictionary, page 1275 (5th Ed., 1979)
(Footnote Continued)

(f) The Fallacy of Liability for Unforeseeable Injury.

Another of the more popular claims of the products liability reformers is that, under existing law, manufacturers are held liable for unforeseeable product-related

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(Footnote Continued)
defines "strict liability" as follows: "A concept applied by the courts in product liability cases in which a seller is liable for any and all defective or hazardous products which unduly threaten a consumer's personal safety...."

[37] "The liability we are considering is 'strict' in the sense that there is no need to prove that the manufacturer was negligent....Yet, the manufacturer is not an insurer of the product's safety; strict liability is not absolute liability. As a [requirement] to recovery, the plaintiff must prove the product was defective." Schwartz, "A Products Liability Primer", 33 ATLA J. 64, 69-70 (1970) [Emphasis added].

[38] The headnote to 72 C.J.S. Supp, Products Liability, § 11, p. 17, states as follows: "There can be no liability for injury owing to a product unless that product is defective, regardless of whether the recovery is sought on the theory of strict liability, breach of warranty, or negligence."

[39] Section 2(a)(4) of the proposed "Product Liability Reform Act of 1986" (the Administration Bill or "Kasten Amendment") states: "Where product liability law is not based on fault or wrongdoing by the defendant, product liability law often operates to punish and deter conduct and activities which are beneficial and promote the public welfare." It is difficult for us to see how the manufacture and distribution of defective and unreasonably dangerous
(Footnote Continued)

injury.[40] This is simply not the case. Under existing law, the injured victim must prove, not just one, but three types of foreseeability: (1) that the risk of harm was reasonably foreseeable, (2) that the use to which the product was put was reasonably foreseeable, and (3) that the injured party fell within the class of reasonably foreseeable victims.[41]

Liability based on the manufacturer's negligent failure to warn of the dangerous nature of its product requires proof of reasonable foreseeability.[42] Liability for breach

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(Footnote Continued)
products is a "beneficial" activity which "promotes the public welfare".

[40] In introducing the Administration Bill (Kasten Amendment), Senator Kasten stated that, "Our courts have held persons liable for failing to warn about product dangers which were unknowable at the time; ...and held liable those who failed to warn about product uses which were totally unforeseeable." Congressional Record - Senate (April 30, 1986). Having researched, followed and practiced products liability law for 20 years, I have no knowledge of any such cases. In any event, it seems that Senator Hollings' comment to one of the product liability reform witnesses at the May 20, 1986, Senate Commerce Committee Hearing is particularly appropriate here: "It strikes me that what you need are some better lawyers." [Transcript, p. 93 (19-20)].

[41] Kimble & Lesher, Products Liability, § 73, pp. 121-124 (West's Handbook Series 1979). This rule is contained in § 395 of the Restatement of Torts, 2d by the American Law Institute. Comment b. to this section states as follows: "This section states the rule thus generally adopted. The justification for it rests upon the responsibility assumed by the manufacturer toward the consuming public, which arises, not out of contract, but out of the relation resulting from the purchase of the product by the consumer, upon the foreseeability of harm if proper care is not used; upon the representation of safety implied in the act of putting the product on the market; and upon the economic benefit derived by the manufacturer from the sale and subsequent use of the [product]."

[42] "The duty to warn unquestionably rests on foreseeability, as does liability in negligence on other
(Footnote Continued)

of implied warranty also requires proof that the damages were the "natural" or foreseeable results of the product defect,[43] and the same foreseeability requirement applies to an action based on "strict liability" for defective and unreasonably dangerous products.[44]

In our experience, product manufacturers will claim that almost any product injury was unforeseeable. Automobile manufacturers will claim that gasoline tank explosions from rear-end collisions are unforeseeable. Power press manufacturers will claim that amputation of workers' hands in the unguarded jaws of the press are unforeseeable. Crane manufacturers will claim that electrocutions from contact

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(Footnote Continued)
grounds in products liability cases." Frumer & Friedman, Products Liability, Vol. I, § 8.03[1], p. 161. "Foreseeability must be based on the manufacturer's notice or knowledge of the danger. But...the manufacturer must keep abreast of scientific advances, is under the duty to make tests to ascertain the nature of his product, and either has or should have a superior knowledge of his product...." id. at p. 164.

[43] See 77 C.J.S., Sales, § 374, p. 1318, at footnote 7. The "essential issue" in products cases based both on negligence and implied warranty is foreseeability. The manufacturer "must be expected to anticipate the environment which is normal for the use of his product and...he must anticipate the reasonably foreseeable risks of the use of his product in such an environment." Gardner v. QHS, Inc., 448 F.2d 238, 242-243 (4th Cir. 1971), quoting from Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83-84 (4th Cir. 1962).

[44] "The ordinary tort rules of causation are applicable in products liability cases, whether the basis of recovery is negligence or strict liability. Recovery in any products liability action requires that the injury incurred must have been actually caused by the defective condition of the product. In addition...the defect must be the legal or proximate cause of the harm....This requirement of proximate cause is usually phrased in terms of foreseeability of danger or harm, with foreseeability held to mean that which it is objectively reasonable to expect, not merely what might conceivably occur...." 72 C.J.S. Supp, Products Liability, § 30, pp. 46-48.

with high voltage power lines are unforeseeable. Yet, how can these documented dangers be unforeseeable if they have happened thousands of times before?

The majority of the claims that product manufacturers are held liable for unforeseeable product related injury come from manufacturers who have unsuccessfully argued that position before juries who found otherwise. Their disgruntled complaints lend support to the old maxim: "He who feels the halter draw has a poor opinion of the law."[45]

(g) The Fallacy of Lower Litigation Costs.

The claim of the products liability "reformers" that their proposed legislation will result in lower litigation costs is another unfounded contention.[46] The exact opposite will inevitably occur. Abolition of joint and several liability will result in multiple defendants in almost all products cases.[47] Caps on recoveries of damages for pain and suffering, disfigurement and loss of companionship will virtually eliminate settlements.[48] Abolition of "strict liability" for defective and unreasonably dangerous products will require more extensive discovery and proof of negligence.[49] Separate claims procedures[50] will prolong litigation. All of these factors will lead to increased litigation costs.

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[45] "No man e'er felt the halter draw, with good opinion of the law," John Trumbull, from Evans, Dictionary of Quotations, p. 378 (1968).

[46] See, Minority Views of Senator Slade Gorton, who stated that the proposed "Product Liability 'Reform' Act", "rather than reducing transaction costs, is likely to increase them significantly." See, Report on "The Product Liability 'Reform' Act", *supra*, Note 23, page 102. See, also, Minority Views of Senator Gore, who stated: "Instead of establishing an efficient system of prompt and fair recoveries while reducing transaction costs, the Committee Bill will serve only to complicate and lengthen the litigation process...." Report, *supra*, page 123.

[47] "This revision of the joint and several liability doctrine will prohibit a victim from recovering for any harm committed by a potential defendant that has not been sued. Consequently, [it] encourages victims to identify and sue each and every party that may be remotely responsible for the injury. That change will increase the number of parties before the court, the number of issues and motions to be resolved, the cost of litigation, and, in many instances,
(Footnote Continued)

It is difficult for the products liability "reformers" to conceive of the practical effects of their legislative proposals because few, if any, have had any significant practical experience in the trial of products cases. Their wayward feet are unlit by the lamp of experience.[51]

(h) The Fallacy of Expediting Products Cases.

In his testimony to the Senate Commerce Committee on May 20, 1986, Attorney General Meece referred to certain

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(Footnote Continued)
the complexity of a given case." Minority Views of Senator Gore, Report, supra, Note 23, page 123.

[48] See, Minority Views of Senator Slade Gorton, Report, supra, Note 23, page 101.

[49] See, for example, Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)", 69 Yale Law J. 1099, 1115-1116 (1960) and Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)", 32 ATLA J. 21-25 (1968).

[50] See, so-called "expedited settlements" provisions in Title II of the proposed "Product Liability 'Reform' Act", Senate Bill 2760, 99th Congress, Second Session, Calendar No. 856, §§ 201-206.

[51] "I have but one lamp by which my feet are guided, and that is the lamp of experience." Patrick Henry, Bartlett's Familiar Quotations, p. 465A (14th Ed., 1968). This is one of the great advantages of the common law. In each case, the court considers, not only the philosophy of abstract legal principles, but the practical effect of rules of law in a variety of individual situations.

aspects of the Administration Bill[52] which were designed to "alleviate burgeoning case loads" and to allow the injured victim to be compensated "in a more timely fashion".[53] As with litigation costs, the opposite result is inevitable if this legislation is adopted.

For example, the practical effects of adding multiple defendants will increase costs and prolong litigation.[54] In any case where a product related injury is followed by less-than-optimal medical care, abolition of joint and several liability[55] will encourage the manufacturer to attempt to shift a portion of the responsibility to the treating physician.[56] A products case will then become both a products case and a malpractice case. This will inevitably result in skyrocketing litigation costs and inordinate delays in the litigation process.

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[52] Referred to as "alternative dispute resolution mechanisms". [Transcript, 13 (18-19)].

[53] Transcript of May 20, 1986, hearing, p. 13 (18-20). In introducing his Bill on May 20, 1986, Senator Danforth referred to "a simple alternative settlement system that makes injured persons whole on an expedited basis and without the costs associated with prolonged litigation."

[54] See, Minority Views of Senator Gore quoted in Footnote 47 above.

[55] The proposed "Product Liability 'Reform' Act", Senate Bill 2760, supra, Note 50, § 308, proposes to abolish joint and several liability for "non-economic damages".

[56] Under the proposed "Product Liability 'Reform' Act", § 308(a), the manufacturer's responsbility for resulting damages would be reduced by the pro rata fault of both parties and non-parties. See, Minority Views of Senator Gore, quoted in Footnote 47 above. The practical effect of such provisions would be to encourage the manufacturer to point the blaming finger in each case in as many directions as possible and to force the plaintiff, for his own protection, to add all of them as parties to the action.

(i) The Fallacy of Double Recovery.

Under the collateral source rule, the injured victim may recover his hospital expenses from the negligent manufacturer despite the fact that a portion of his hospital expenses have been paid from his own hospital insurance.[57] Products liability "reformers" contend that this rule allows for double recovery by the injured victim.[58]

In actuality, hospital insurance payments are not payments from a "collateral" source. They are payments made by the injured victim himself. The victim pays his insurance premiums over a period of years so that an insurance fund will be established to cover any future hospitalization.

Quite often, by the time of his injury, he has paid more to his insurance company in premiums than the amount of his hospital bill. The same rationale applies to other types of insurance such as life, disability, or accident insurance.[59]

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[57] "Under this rule, if an injured person receives compensation for his injuries from a source wholly independent of the [defendant] the payment should not be deducted from the damages which he would otherwise collect from the [defendant]....In other words, a defendant...may not benefit from the fact that the plaintiff has received money from other sources as a result of the defendant's tort, e.g. sickness and health insurance." Black's Law Dictionary, p. 238 (5th Ed., 1979).

[58] In describing the proposed Product Liability Reform Act of 1986 (Administration Bill - Kasten Amendment) to the Senate Commerce Committee, Attorney General Meece stated that this proposed legislation "provides for the modification of collateral compensation doctrines to eliminate double recoveries by the plaintiffs." Transcript of May 20, 1986, Hearing, p. 13 (15-17).

[59] Under §§ 102(a)(3), 102(a)(11), 201(b), 201(c), and 204, if the defendant makes a settlement offer, the injured product victim's recovery for economic damages is restricted
(Footnote Continued)

To abolish the collateral source rule by penalizing the conscientious victim who has had the foresight to purchase insurance does not prevent double recovery. It prevents single recovery. It rewards the wrongdoer at the expense of the victim.[60]

(j) The Fallacy of Windfalls in Future Damage Awards.

The proposed "Product Liability 'Reform' Act" permits product manufacturers to make payments of awards for future damages "periodically as costs are incurred."[61] In his testimony before the Senate Commerce Committee, Attorney General Meece described this as a provision providing "for future economic damages to be paid in periodic installments,

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to "net economic loss" after deducting all so-called "collateral benefits", including "all benefits and advantages received or entitled to be received" under "any life, health or accident insurance or plan, wage or salary continuation plan, or disability income or replacement service insurance or any benefit received or to be received as a result of participation in any prepaid medical plan or health maintenance organization." Proposed Act, supra, § 102(a)(3).

[60] As to the collateral source rule, see generally, Helfend v. Southern California Rapid Transit District, 84 Cal.Rptr. 173, 465 P.2d 61 (1970); Hudson v. Lazarus, 217 F.2d 344, 346 (D.C.Cir. 1954); Hueper v. Goodrich, 314 N.W.2d 828 (S.Ct.Minn. 1982); Harding v. Town of Townshend, 43 Vt. 534 (1870); Restatement of Torts, 2d, § 920A, Comment b.; Hogan, "The Collateral Source Rule: Its Justification and Its Defense", 19 Trial 58 (February, 1983); Stein, "Compensation from a Collateral Source", Chapter 10 in Damages and Recovery - Personal Injury and Death Actions, pp. 287-324 (1972); Averbach, "The Collateral Source Rule", 21 Ohio St. L.J. 231 (1960); Maxwell, "The Collateral Source Rule in the American Law of Damages", 46 Minn. L.Rev. 669 (1962); Comment, "Damages -- The Collateral Source Rule", 63 Va. L.Rev. 177 (1961).

[61] Senate Bill 2760, 99th Congress, Second Session, Calendar No. 856, § 205(a).

to take away the windfall[62] effect."[63] In fact, there is no windfall, as existing law requires future damages to be reduced to their present cash value.[64]

(k) The Fallacy of the "Deep Pocket".

The Report of the Tort Policy Working Group refers to existing tort doctrines which supposedly "shift liability to 'deep pocket' defendants even though they did not cause the underlying injury, or had only a limited or tangential involvement."[65] The first answer to this absolute absurdity is that existing tort law does not impose liability on defendants who "did not cause the underlying injury or had only a limited or tangential involvement".[66] The second answer to this absolute absurdity is that there is no credible authority to support this "deep pocket" theory.[67] The only real evidence appears to support a contrary view.[68]

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[62] "Excess... proceeds." See Winston v. United States, 342 F.2d 715 (9th Cir. 1965). "An unexpected gain, piece of good fortune, or the like." Random House Dictionary of the English Language, p. 1636 (Unabridged Ed., 1973). See 46 Words and Phrases, p. 36.

[63] Senate Commerce Committee Transcript, p. 13 (12-14), (May 20, 1986).

[64] "Present value of future damages. An allowance for future damages must be reduced to its present value, and in passing on such damages, the jury may allow only such sum as put at simple interest would, with interest accumulations, amount to such damages at the time or times in the future when the jury find from the evidence they will be sustained." 25A C.J.S., Damages, § 194, p. 259. See, also, Am.Jur.2d, Damages, §§ 26-29.

[65] Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, pp. 2, 33-34 (February, 1986).

[66] Under the Restatement of Torts, 2d, § 431, there is no liability unless the defendant's conduct "is a substantial factor in bringing about the harm." Comment a. to § 431 states: "In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent....This is necessary, but
(Footnote Continued)

(1) The Fallacy of Excessive "Transaction Costs".

Those who support products liability "reform" cite what they refer to as "excessive transaction costs"[69] in support of their recommendation to "schedule contingency fees" for

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(Footnote Continued)
it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm." Listed in the Appendix to § 431 are no less than 44 pages of citations to cases which have repeatedly applied this principle in virtually every American jurisdiction.

[67] The Report of the Tort Policy Working Group, supra, Note 65, cites no authority for its "deep pocket" theory. See, pp. 33-34, Footnotes 28-34. The Rand Institute's booklet by Chin & Peterson entitled, "Deep Pockets, Empty Pockets, Who Wins in Cook County Jury Trials" (1985) is based on one data source only [page xi] and admits: "Patterns that we observed could reflect differences in liability issues among trials...." [page x]. "These findings do not necessarily mean that juries treated types of litigants differently. It is possible that trials differed among types of defendants in ways not examined in our analyses. Most important, our analyses did not take liability issues into account...." [page v].

[68] "Some researchers have hypothesized that plaintiffs receive large jury awards because jurors view certain defendants as having 'deep pockets'. However, interviews with jurors in federal and state courts in southeast Pennsylvania revealed no significant finding that awards were based on the ability of the defendant to pay. The jurors' decisions rested primarily on their consideration of whether the plaintiff deserved to win based on the facts of the case and the applicable law, as well as the necessity to deter misconduct." Minority Views of Senator Ernest F. Hollings, Report on the "Product Liability 'Reform' Act", supra, Note 23, page 113, citing Guinther, "The Jury in America" (Preliminary Report prepared for delivery at Earl Warren Conference, Cambridge, Mass., June, 1986).

[69] See, Report of Tort Policy Working Group, supra, Note 65, page 2.

the lawyer of the injured victim.[70] It is signficant that, although the Senate Commerce Committee determined that attorney's fees of defective product manufacturers exceeded those of injured product victims,[71] the products liability "reformers" only recommend that the attorney's fees of the injured victim be cut. The real reason is not to limit so-called "transaction costs", but to limit the attorney's incentive to obtain an appropriate award for his injured client. This is dramatically demonstrated by the Insurance Information Institute's $6.5 million pamphlet[72] entitled, "The Lawsuit Crisis" which contains "10 Reforms for the Lawsuit Crisis", including:

> "Regulating Contingency Fees.
>
> "To make sure everyone has access to an attorney, 'contingency fees' provide for lawyers to be paid a percentage of the final settlement. Sometimes this encourages lawyers to push for higher awards to create higher fees...."[73]

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[70] See, Testimony of Attorney General Meece, Senate Commerce Committee Hearing, p. 13, lines 23-25 (May 20, 1986); Report of Tort Policy Working Group, supra, Note 65, pp. 72-74.

[71] The Report of the Senate Commerce Committee on page 3 cites a study by the Insurance Services Organization on approximately 25,000 closed claims which concluded that, of every $1 paid in claims, the insurance industry paid "an average of 42¢ in defense costs", 67¢ went to the victim and 33¢ went to the victim's attorney. Therefore, of each $1.42, 47% went to the product victim, 30% to the product manufacturer's attorney, and only 23% to the injured victim's attorney.

[72] See, "Media Blitz: Insurers Claim Lawsuit Crisis", 72 American Bar Association Journal 19 (June 1, 1986). The Insurance Information Institute is "supported by more than 300 insurance companies". See, "The Lawsuit Crisis" cited in Footnote 73 below, page 7.

[73] Insurance Information Institute pamphlet entitled, "The Lawsuit Crisis", p. 4 (April, 1986). Pushing for "higher awards" for catastrophically injured victims is (Footnote Continued)

(m) The Fallacy of Fairness.

Those who are pressing so vigorously for products liability "reform" claim that their proposals are fair. Nothing could be further from the truth. Here are a few examples:

1. Caps on Damages. Even the most ardent supporters of the proposed "Product Liability 'Reform' Act" admit that "numerous studies have found that the tort system" currently is guilty of "underpaying people with the most serious losses."[74] The "Product Liability 'Reform' Act" would compound this injustice by placing caps on damages awards,[75] further depriving the catastrophically injured victim of his right to just compensation.[76]

(Footnote Continued)
required by Canon VII of the Code of Professional Responsibility which requires a lawyer to represent his client "zealously within the bounds of the law." Even the supporters of products liability "reform" admit that "numerous studies have found that the tort system" is guilty of "underpaying people with the most serious losses." Senate Commerce Committee Report on the "Product Liability 'Reform' Act", Report 99-422 (Calendar No. 856), page 4 (August 15, 1986).

[74] Majority Report of Senate Commerce Committee on the Proposed Product Liability Reform Act, Report 99-422 (Calendar No. 856), p. 4 (August 15, 1986).

[75] See, Senate Bill 2760, § 204(c).

[76] See, for example, Additional and Minority Views in Senate Commerce Committee Report. Senator Stevens called the caps "inappropriate" [p. 98]. Senator Rockefeller called them arbitrary and "nowhere near sufficient" [p. 99]. Senator Gorton called them an "incredible injustice" [p. 101]. Senator Hollings quoted an insurance executive, who said they would inflict "substantial injustice" [p. 104]. Senator Inouye called them "unjust to the point of absurdity." [p. 116]. And Senator Gore said that caps "would work the greatest injustice against individual victims" [p. 118] and concluded that "Congress must not sacrifice justice to reduce the cost of litigation." [p.
(Footnote Continued)

2. Exclusion of Commercial Loss. The "Product Liability 'Reform' Act" deprives the injured victim of his right to a jury trial, the collateral source rule, joint and several liability, implied warranty of the product seller, and just compensation, but excludes actions for "commercial loss"[77] so that one big business can still sue another big business and enjoy the benefits of a jury trial, the collateral source rule, joint and several liability, implied warranty of the product seller, and "uncapped" just compensation.

3. Abolition of Rights, But Not Defenses. In the name of uniformity,[78] the "Product Liability 'Reform' Act" deprives the injured product victim of causes of action against sellers of defective products for implied warranty, failure to warn, and strict liability for defective and unreasonably dangerous products, but preserves all the available defenses of the product manufacturer and product seller currently existing under state law.[79]

4. Periodic Payments for Future Damages. The "Product Liability 'Reform' Act" permits product manufacturers to make periodic payments for future damages even though existing law requires the jury to reduce future damages to their present cash value.[80]

(Footnote Continued)
119]. "The [provisions of the Product Liability 'Reform' Act] effectively leave injured persons without anything approaching fair compensation for pain and suffering...." [Senator Gore, p. 124].

[77] Senate Bill 2760, § 103(a).

[78] Senate Bill 2760, §§ 103(e) and 302.

[79] See, Senate Bill 2760, §§ 103, 301, and 302.

[80] Senate Bill 2760, § 205. "Present value of future damages. An allowance for future damages must be reduced to its present value, and in passing on such damages, the jury
(Footnote Continued)

5. Abolition of the Collateral Source Rule for Victims. Provisions of the "Product Liability 'Reform' Act" abolishing the collateral source rule give the product manufacturer credit against actual economic damages suffered by victim for all benefits which the victim has received or entitled to receive, including life, health, accident and disability insurance paid for entirely by the victim, and even for food stamps or welfare which the victim may be entitled to receive, but may not have applied for.[81] To compound this outrage, the product manufacturer may place whatever amount it "reasonably anticipates the claimant will receive from collateral sources" in "an interest-bearing escrow account."[82]

6. Proposal to Limit Contingency Fees. Although the insurance industry itself appears to have concluded that attorneys' fees paid to defense attorneys exceed those paid to plaintiffs' attorneys,[83] the Administration's Tort Policy Working Group only recommended cutting the product victim's

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(Footnote Continued)
may allow only such sum as put at simple interest would, with interest accumulations, amount to such damages at the time or times in the future when the jury finds from the evidence they will be sustained." 25A C.J.S., Damages, § 194, p. 259. See, also, Am.Jur.2d., Damages, §§ 26-29.

[81] See, Senate Bill 2760, § 102(a)(3). Laws which would give the wrongdoer, regardless of the degree of his guilt, a credit for the injured victim's life insurance or hospital insurance, no matter what the sacrifice or amount of premiums which the victim has scrimped and saved to pay, demonstrates the incredible injustice of the entire concept of this so-called "Product Liability 'Reform' Act".

[82] Senate Bill 2760, § 102(b).

[83] See, Senate Commerce Committee Report on Senate Bill 2760, supra, Note 23, p. 3, which cites a 1977 survey of approximately 25,000 closed claims conducted by the Insurance Services Office. This survey found that "insurers paid an average of 42¢ in defense costs" per $1 of claims paid against a typical plaintiff's "contingent fee of 33¢ in legal costs."

attorney's fees and not those of the product manufacturer.[84] Although this recommendation was not included in the Senate Commerce Committee Bill, "a bitter Senator Bob Kasten (R-Wis.)" said that he "remained optimistic and would try again on the Senate floor."[85]

(n) The Fallacy of Broad-Based Support.

Products liability "reformers" and their allies have gone to great lengths to create the impression of broad-based support.[86] The fact is, their support comes primarily from the liability insurance industry,[87] product manufacturers,[88] and other special interest groups who stand to benefit most from the elimination of the rights of victims.[89] This callous coalition has set about to create a crisis[90] by raising rates and cancelling coverage of unsuspecting policyholders.[91] Thus far, however, their

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[84] See, Report of Tort Policy Working Group, Recommendation No. 7, pp. 72-74 (February, 1986), which recommends "scheduling contingency fees". See, discussion in § (l) on pp. 22-23 above.

[85] Liability Week, Vol. 1, No. 8, p. 1 (June 23, 1986).

[86] See, for example, the recent publication entitled, The Need for Legislative Reform of the Tort System (May, 1986), which lists 134 "endorsing organizations". However, two-thirds of these organizations are made up of medical groups such as the American Medical Association, trade associations such as the National Association of Manufacturers, and professional groups such as the American Institute of Architects. The remaining one-third are mainly made up of contractors, business executives, manufacturers, and insurance industry organizations such as the National Constructors Association, U. S. Business and Industrial Council, the American Insurance Association, General Motors, and AMOCO.

[87] See, for example, "Media Blitz: Insurers Claim Lawsuit Crisis", 72 ABA J. 19 (June 1, 1986), which states that "the property and casualty insurance industry has launched a $6.5 million television and print advertising campaign seeking changes in tort laws....The insurance industry's campaign began in March with ads in Sunday newspaper magazines in 12 states....Ads have since appeared in Time, Newsweek, and Readers' Digest. The television ads were slated to run on the NBC Nightly News....The print ads include a coupon that can be sent to the Insurance Information Institute for 'The Lawsuit Crisis' pamphlet...."
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According to this pamphlet, the Insurance Information Institute "is supported by more than 300 insurance companies." See "The Lawsuit Crisis", p. 7 (Insurance Information Institute) (April, 1986).

[88] See, for example, "Issue Brief, A Public Policy Summary on Product Liability Tort Reform" by the National Association of Manufacturers (January, 1986) in which the NAM claims to have "provided substantial additional input during the drafting process" of the so-called "Product Liability 'Reform' Act".

[89] This would include physicians who want immunity from liability for medical malpractice, architects who want immunity from liability for defectively designed structures such as the falling skywalks of Kansas City, industrial polluters who seek immunity from liability for toxic waste, the asbestos industry, manufacturers of the Dalkon Shield, etc.

[90] See, for example, Olender, "The Great Insurance Fraud of the Eighties", National Law Journal, p. 15 (July 21, 1986); Stewart, "The 'Tort Reform' Hoax", Trial 89-94 (July, 1986); Butler, "'Insurance Crisis' A Camouflage for Greed", Atlanta Journal/Constitution (August 17, 1986); Hunter & Angoff, "Insurance Industry Fouls it Own Nest", Los Angeles Times (February 4, 1986).

[91] According to Consumer Reports, "In June, 1985, John Byrne, then Chairman of the Board of Geico, a major insurance company, told the Casualty Actuaries of New York that 'the insurance industry should quit covering doctors, chemical manufacturers, and corporate officers and directors.' Byrne also said, 'It is right for the industry to withdraw and let the pressure for [tort] reform build in the courts and in the state legislatures.'" "The Manufactured Crisis: Liability Insurance Companies Have Created A Crisis And Dumped It On You", Consumer Reports, p. 544-545 (August, 1986).

attempts to blackmail[92] a bewildered public have largely failed and through the smokescreen, the American consumer sees the situation for what it is: "The Manufactured Crisis."[93]

(o) The Fallacy of "Reform".

The word "reform" does not mean to change simply for the sake of change and it does not mean to change for the worse. It means to change for the better.[94] Product liability "reform", as presently proposed by the manufacturers of defective and unreasonably dangerous products and by the liability insurance industry, definitely means to change for the worse by literally destroying our present system of civil justice. This sweeping legislation will affect the lives of all Americans for years to come. It will abolish or severely limit the application of beneficial doctrines slowly and carefully developed and refined by the combined wisdom of 1,000 years of English and American common law. Two of the most prominent victims of this so-called "reform" movement are "equal and exact justice to all men" and the right of trial by jury.[73] Others include:

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[92] See, *e.g.*, "'Industry Blackmail' Forces State Reversal of Insurance Reform", *Greenville News* (February 4, 1986).

[93] See, "The Manufactured Crisis", *supra*, Note 91, which states: "In its advertising and in most statements to the press and public, the insurance industry lays blame for the crisis on lawyers, juries, or victims....A more objective analysis suggests that the 'crisis' is of the insurance industry's own making...." *Consumer Reports* cites a Washington State task force report which concluded that the so-called "crisis" is "mostly a result of poor management practices by the [insurance] companies" and a report by the New York Governor's Advisory Commission on Liability Insurance which said that the insurance industry's allegedly poor financial condition [only $75 billion in net profits during the past 10 years] "largely reflects self-inflicted wounds." See, also, "Tort Study Scorecard", *ABA J.*, p. 26 (September 1, 1986), which states that "ABA officials testified in February before a Senate subcommittee that a 5-year ABA tort study showed the system is working."

[94] See, *Random House Dictionary of the English Language*, p. 1206 (Unabridged Ed., 1973), which defines the word "reform" as "the improvement or amendment of what is wrong, corrupt, unsatisfactory, etc."

(1) The Collateral Source Rule. An equitable doctrine which recently celebrated its bicentennial birthday.[74]

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[73] "Equal and exact justice to all men,...freedom of religion; freedom of the press,...and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and the blood of our heroes has been devoted to their attainment. They should be the creed of our political faith...; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety." Thomas Jefferson, First Inaugural Address, Bartlett's Familiar Quotations, page 472 (14th Ed., 1968). The 7th Amendment to the United States Constitution, ratified December 15, 1791, provides for the right of trial by jury in civil cases: "In suits at common law...the right of trial by jury shall be preserved...."

[74] From Mason v. Sainsbury, 3 Douglas 61 (Eng. 1782) and Yeates v. White, 132 Eng.Rep. 793 (Eng. 1838), it was adopted in the United States in Propeller Monticello v. Mollison, 58 U.S. 152 (1854) and Althorfe v. Wolfe, 22 N.Y. 355 (1860). It is now almost universally followed in the United States. See Restatement of Torts, 2d, § 920A, Comment b., by the American Law Institute, which provides as follows: "Benefits from collateral sources...It is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself....One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes...." See, also, Annotation: "Collateral Source Rule: Hospital or Medical Insurance", 77 ALR3d 415 (1977).

(2) Joint and Several Liability. An equitable doctrine which dates back to the The Edicts of Ulpian, a Roman jurist in the 3rd Century A.D.[75]

(3) Liability of the Product Seller for Failure to Warn.[76] Liability to the ultimate consumer for negligent failure to warn of the dangerous nature of a product dates back to the turn of the century.[77]

(4) Liability of the Product Seller for Breach of Implied Warranty.[78] Liability for breach of implied warranty of product defects dates back to the Code

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[75] See, Scott, The Civil Law, Vol. 4, p. 84 and Vol. 6, p. 147 (1932). See, also, League, Roman Private Law, pp. 345-347 (1906) and Buckland, A Manual of Roman Private Law, § 141, p. 349 (1939).

[76] § 302(b) of Senate Bill 2760 provides that a product seller could be held liable for failure to warn only if he failed to pass on "written warnings or instructions received while the product was in the product seller's possession and control." This would apply regardless of the product seller's own independent knowledge of the dangerous nature of the product. Therefore, proof that the product seller knew of the danger, or that he received oral warnings from the product manufacturer, or written warnings from some other source, would not be sufficient to establish liability under this so-called "reform".

[77] See, for example, Waters-Pierce Oil Co. v. Deselms, 212 U.S. 159, 177-178, 29 S.Ct. 270, 275-276, 53 L.Ed. 453 (1909); Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (8th Cir. 1903); Louis v. Terry 111 Cal. 39, 43 Pac. 398 (1896); Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892). See cases collected in the Reporter's Notes to the Appendix to § 388 of the Restatement of Torts, 2d, pp. 373-374. See, also, Restatement of Torts, 2d, § 388.

[78] § 302(a) of the Senate Bill 2760 limits the product seller's liability to "independent acts of negligence or breach of express warranty" independent of any express warranty made by [the] manufacturer." Therefore, by necessary implication, § 302(a) abolishes §§ 2-314 and 2-315 of the Uniform Commerical Code which has been adopted in all
(Footnote Continued)

Napoleon.[79]

(5) Liability of the Product Seller for Sale of Defective and Unreasonably Dangerous Products.[80] Commonly called "strict liability", this concept dates back to the 13th Century.[81] It was applied to sellers of food by judicial decision before the birth of Columbus.[82] It was applied to sellers of food by American courts in the early

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50 states. See, generally, 3 Squillante & Fonseca, Williston on Sales, §§ 15-19 through 15-23, pp. 387-412 (Lawyers Co-op., 1974).

[79] Section 1641 of the Code Napoleon, adopted in France in 1804, provides that "the vendor is bound to warranty by reason of concealed defects in the thing sold which render it unfit for the use to which it is destined...." Liability for implied warranty is now codified in § 2-315 of the Uniform Commercial Code adopted in all 50 states. Implied warranties under English common law have existed for more than 200 years. See Blackstone's Commentaries on the Laws of England, Vol. III, page 158, which states that implied contracts "are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and, upon this presumption, makes him answer to such persons, as suffer by his nonperformance." See, also, Blackstone, Vol. III, page 165, which states: "In contracts for provisions it is always implied that they are wholesome; and, if they be not, the same remedy may be had. Also if he, that selleth any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer: else it is an injury...for which an action...will lie to recover damages."

[80] See, § 302(a) of Senate Bill 2760 quoted in Footnote 78 above, which abolishes by necessary implication strict liability and implied warranty on the part of the product seller.

[81] See Reporter's Notes to § 402A of the Restatement of Torts, 2d.

[82] "Beginning about 1431", according to Dean Prosser. See Prosser, "The Assault Upon the Citadel (Strict Liability
(Footnote Continued)

19th Century.[83] Following World War II, its application was extended from food to such products as soap, hair dye and grinding wheels.[84] By 1963, it was being applied to products generally[85] and in 1964, its application to products generally was adopted by the American Law Institute.[86] Strict liability is now applied to products generally in 46 of the 50 states.[87]

(6) The Right of Equal Access to the Courts. The right of equal access to the courts necessarily implies the right of counsel: not just any counsel, but equal counsel. The contingent fee system provides the poor and moderate-income American with access to counsel equal in experience and ability to that of the richest and most powerful corporation. By drastically limiting contingent fees, the products liability "reformers" would deprive the average American citizen of this important right. Although this recommendation is not included in the Committee's proposed "Product Liability 'Reform' Act", Senator Kasten

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to the Consumer)", 69 Yale Law J. 1099, 1104 (1960). Columbus was born around 1446.

[83] Van Bracklin v. Fonda, 12 Johns. 468 (N.Y. 1815) called it "a principle, not only salutary, but necessary to the preservation of life and health." See Prosser, supra, Note 46, page 1104.

[84] See "Beyond Food", Prosser, supra, Note 46, pp. 1110-1114.

[85] "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).

[86] See § 402A of the Restatement of Torts, 2d.

[87] The exceptions are Massachusetts, Virginia, North Carolina, and Wyoming.

has vowed to reintroduce this restriction on the Senate floor.[88]

(7) The Right of Trial by Jury. This ancient right dates back to the Magna Charta. By severely limiting this right, the products liability "reformers" would deprive the average American of an essential element of equal justice.[89]

(8) The Right of Just Compensation. The term "just" means "guided by truth, reason, justice and fairness."[90] Limiting the jury's right to award appropriate compensation by placing an arbitrary cap on damages, regardless of the nature and extent of injury, is certainly not guided by truth, reason, justice or fairness.[91]

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[88] See, Footnote 85 above.

[89] By abolishing the collateral source rule, the proposed Act would effectively abolish the right of most product victims to recover for their medical expenses and loss of wages. To the extent that "net economic loss" exists, Senate Bill 2760, § 201(g), places the determination of all such issues in the hands of the judge. Arbitrary caps on damages deprive the catastrophically injured product victim of his right to a jury trial. See, §§ 102(a)(6) and 204(c). The victim's current rights to a jury trial against the product seller are effectively abolished by the abolition of strict liability, implied warranty, and failure to warn on the part of the product seller. See, §§ 302(a) and 302(b).

[90] Random House Dictionary of the English Language, p. 775 (Unabridged Edition 1973).

[91] See, Minority Views of Senator Daniel K. Inouye of Hawaii, who stated: "A cap [on damages] ...amounts to telling a victim that, as a matter of Congressional policy, the pain that he has suffered or quality of life he has lost is worth only $150,000, $250,000, or some arbitrary figure selected because it sounds fair. I believe this is unjust to the point of absurdity." Senate Commerce Committee Report on Senate Bill 2760, page 116. See, also, Minority Views of Senator Albert Gore, Jr., of Tennessee, who stated that, "The Committee Bill...fails to assure justice,
(Footnote Continued)

Product liability "reform" as presently proposed is not reform, but regression and destruction: regresssion backward in time to the Dark Ages of the law and destruction of the fundamental freedoms of the American public. It like a spreading cancer fed by the insatiable greed of the liability insurance industry and the callous disregard of product manufacturers. It must be opposed and it must be defeated.

> "Victims don't ask for sympathy or charity. Neither do they ask for apathy, indifference, and injustice. Instead they seek compassion, fair play, and a right to obtain justice from a jury of their peers."[92]

(Footnote Continued)
fairness and adequate compensation for those injured by defective products...." Report, supra, page 117. Senator Gore stated that the Bill would "effectively leave injured persons without anything approaching fair compensation for pain and suffering...." Report, supra, page 124.

[92] Perlman, "All Pain & Suffering is Not Equal," Trial, p. 5 (June, 1986).

EXHIBIT B

HISTORY & STATUS OF PRODUCTS LIABILITY "REFORM"

ABSTRACT.

Over the past six years, various proposals to restrict the rights of victims of defective products have been considered by Congress. The original Kasten Bill was introduced in 1981 and was endorsed by the Reagan Administration in 1982. It was reported favorably by the Senate Commerce Committee in 1982 and 1984, but never reached the Senate floor. Since that time, various amendments have been proposed and the insurance industry has spent millions to lobby Congress and to convince the American public that an insurance crisis really exists. Despite testimony by the U.S. Government Accounting Office that the liability insurance industry made $79 billion in net profits during the past 10 years, the Senate Commerce Committee again favorably reported a products bill in June of 1986.

The present bill, mischaracterized as the "Product Liability 'Reform' Act", would effectively deprive the rights of nearly all seriously injured victims of defective products. Its most significant provisions would:

1. Place an arbitrary cap on the recovery of the most seriously injured product victims, regardless of the extent of their injuries or the dangerous and defective nature of the product.

2. Effectively eliminate recovery for medical expenses and lost wages by abolishing the equitable doctrine of the "collateral source rule" and by giving the product manufacturer the full benefit of all life, health, accident and disability insurance carried by the injured victim.

3. Effectively abolish the liability of product sellers for practically all injuries caused by defective and unreasonably dangerous products.

4. Abolish the equitable doctrine of joint and several liability by allowing the defendant product manufacturer to shift responsibility to others for injuries caused by their defective products.

5. Permit the product manufacturer, with its armies of retainered lawyers and insurance adjusters, to individually contest every item of future medical expense and loss of wages suffered by the product victim.

6. Effectively deprive almost every injured product victim of their right to a jury trial.

In this pamphlet, we briefly trace the history of this proposal and discuss its specific provisions.

(a) The Federal Interagency Task Force on Products Liability.

In 1976, the federal government created a federal Interagency Task Force on Products Liability.[1] This task force commissioned a "legal study" which issued its report in 1977.[2] This "legal study" found that the volume and size of damage awards in products cases were not the cause of the problems alleged to exist by the liability insurance industry.[3] In addition, it concluded that allegedly inequitable state tort doctrines were not sufficient to cause a change in the availability or cost of liability insurance.[4] Still, product manufacturers persisted in their efforts to "reform" product liability laws.

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[1] See report of Senate Commerce Committee on Senate Bill No. 44, page 75 (May 23, 1984).

[2] Interagency Task Force on Products Liability, Final Report of the Legal Study (1977).

[3] See Final Report, supra, Note 2, III., 131-32; cited in Page & Stephens, "The Product Liability Insurance 'Crisis'", 13 Capital Univ. L. Rev. 387-404 (1984) and in Report on Senate Bill 44, supra, Note 1, page 78 at footnote 27. That these alleged problems and this concocted "crisis" are an out-and-out hoax are shown by a recent report of the General Accounting Office. See Finch, GAO Report on Profitability of Property/Casualty Insurance Industry, pages 1, 7 (April 28, 1986). In this report and in testimony before the Subcommittee on Consumer Affairs, Senate Commerce Committee, on May 20, 1986, the GAO found that the liability insurance industry had net gains between $50 and $79 billion during the past 10 years and that the industry itself projected net gains before taxes "of more than $90 billion over the years 1986-1990." See Subcommittee Transcript, p. 214 (4-17).

[4] "[T]he overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, no inequitable doctrine or group of doctrines, even if changed immediately, could produce a greater availability of or a lower cost for insurance." Final Report of Legal Study, supra, Note 2, page 126. "The (Footnote Continued)

(b) Proposed Model Uniform Product Liability Reform Act.

In October of 1979, the Department of Commerce published its so-called "Model Uniform Product Liability Reform Act".[5] Heavily stacked against victims of defective products, it was offered for "voluntary use by the states." Among its provisions were restrictions on liability for defective and unreasonably dangerous products under Section 402A of the Restatement of Torts, imposition of a ten-year statute of repose and a two-year statute of limitations, establishment of comparative negligence and compulsory arbitration, abolition of joint and several liability, modification of the collateral source rule, and restrictions on punitive damages. Many of these provisions have been carried forward in later proposals.

(c) Original Kasten Bill.

In mid-1980, a "Federal Uniform Product Liability Act" was introduced in the House of Representatives.[6] In October of 1981, Senator Kasten introduced a similar bill in the Senate. Hearings were held by the Senate Commerce Committee in May and June of 1982. In July, the Reagan Administration endorsed the concept of "federal legislation providing for

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argument that jury verdicts and expanded tort doctrine contributed to the product-liability 'Crisis' lacks substance....There is no correlation between the easing of the 'Crisis' and any shifts in the substantive law of product liability." Page & Stephens, supra, Note 3, p. 401.

[5] 44 Federal Register 62,714 (10/31/79).

[6] HR 7921. See report of the Senate Commerce Committee on Senate Bill 2631, pages 10-11 (12/1/82).

uniform product liability standards"[7] and, in October of 1982, the Senate Commerce Committee reported out the original Kasten "Product Liability Act".

The original Kasten Bill was similar in many respects to the Department of Commerce "Model Uniform Product Liability Act" of 1979. It restricted the liability of manufacturers and abolished strict liability of the sellers of defective and unreasonably dangerous products, established comparative negligence, modified the collateral source rule with respect to Workmen's Compensation payments, imposed a statute of repose, and provided for the judge to determine the amount of punitive damages.

The original Kasten Bill died at the adjournment of the 97th Congress and was reintroduced in the 98th Congress in January of 1983.[8] Hearings were held on the Kasten Bill in April of 1983 where it was opposed by the American Bar Association and the Consumer Federation.

In February of 1984, Senator Hollings spoke forcefully against the Kasten Bill:

> "...It would drastically curtail the ability of consumers and workers to be awarded compensation for product-related injuries. Any federal codification which makes the system easier for manufacturers could leave entire classes of injured product users without a means of receiving just compensation....
>
> "...The development and practice of common law in the states during the past 200 years has worked well to balance the interests of consumers and workers with those of product manufacturers, sellers and distributors. Product liability law has developed over the years through this careful evolution of common law -- all the while adapting itself to the ever-changing technologies and

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[7] See Senate Commerce Committee Report, supra, Note 6, page 11.

[8] Senate Bill 44, 98th Congress First Session.

concepts of justice and social responsibility...."[9]

Additional hearings were held on the Kasten Bill in March of 1984, after which it was reported out by the Committee by a vote of 11 to 5. The Wall Street Journal reported that "consumers would find winning awards difficult" under the Kasten Bill.[10]

In May of 1984, the Commerce Committee published its report on the Bill with minority views by Senator Hollings in which he stated:

> "No matter how serious the injury, no matter how many victims involved, and no matter how strong the evidence that a dangerously defective product injured the claimant -- the standards of S-44 [the Kasten Bill] would deny recovery if. [the burden of proof of negligence] is not met."[11]

Senator Hollings also pointed out that the Bill would create more uncertainty than it proposed to cure:

> "Scholars and jurists conclude that S-44 contains so many novel, confusing and ambiguous terms and standards that its provisions would be subject to conflicting interpretations from 50 state supreme courts and the various federal courts which would hear cases under diversity jurisdiction...."[12]

In June of 1984, the Kasten Bill was referred sequentially to the Senate Labor Committee, which took no action.

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[9] Hollings, "Preserving the Vitality of Tort Law", Trial, pp. 104-105 (February, 1984).

[10] "Many opponents and supporters of the legislation believe it would substantially reduce the numbers of claims brought against companies and would probably result in lower awards from consumers who win product liability cases." Wall Street Journal, p. 12 (March 29, 1984).

[11] Report of Senate Commerce Committee on Senate Bill 44, page 71 (May 23, 1984).

[12] Report of Senate Commerce Committee, supra, Note 11, page. 73.

Senator Cranston announced his intention to filibuster against the Bill and it died with adjournment in October.[13]

Claiming that his Bill would "benefit American manufacturers in competition with foreign companies" and "stabilize insurance premiums", Senator Kasten reintroduced his Bill in the 99th Congress in January of 1985.[14] Hearings were held in March, at which time it was opposed by the Consumer Federation of America, the AFL-CIO, the National Conference of State Legislatures, and the Conference of State Chief Justices. Amendments were proposed by Senator Dodd[15] and by Senator Gorton.[16]

In May of 1985, the Senate Commerce Committee, by virtue of an 8 to 8 tie vote, defeated a motion to report Senator Kasten's Bill favorably to the Senate Floor.

(d) Gorton and Dodd Amendments.

The Gorton and Dodd Amendments proposed so-called "victims' compensation" plans. Both proposed alternatives to traditional tort actions and both limited traditional tort remedies. Basically, they provided for alternative forms of no-fault compensation for product-related injuries. Hearings were held on these Bills in June of 1985, but no further action was taken.

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[13] See, "Congress to Face Product Liability Bill in 1985", Congressional Quarterly, pp. 3067-3071 (December 8, 1984).

[14] Congressional Record - Senate S-217 (January 3, 1985) concerning Senate Bill 100.

[15] Senator Dodd's amendment would have created a no-fault administrative mechanism under which product victims would be entitled to recover economic damages only. See, Congressional Record - Senate (March 19, 1985).

[16] See, Congressional Record - Senate 6090 (May 14, 1985).

(e) Danforth Bill.

In July of 1985, Senator Danforth distributed a preliminary draft of his "Product Liability Voluntary Claims and Uniform Standards Act", which was similar in many respects to the "victims' compensation" proposals of Senator Gorton and Senator Dodd. It contained a so-called "expedited claims procedure" which provided for compensation of "net economic losses" only. It provided an alternative method of compensation through traditional tort litigation, but abolished strict liability and limited punitive damages.[17]

The Danforth Bill was introduced and referred to the Senate Commerce Committee on December 20, 1985.[18] Commenting on the Bill, Senator Danforth said that it "combines uniform product liability standards, along the lines of the Kasten Bill, with an alternative claim or compensation system, similar to those proposed by Senator Dodd and Senator Gorton." Hearings were held on the Danforth Bill in February and March of 1986, at which time it was opposed by representatives of the American Bar Association.

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[17] Commenting on these proposals in the New York Times, Scott Baldwin, immediate past-president of the Association of Trial Lawyers of America, said: "The thrust of the proposal is to do away with the legal doctrine of 'strict liability,' which holds a manufacturer responsible for harm caused by a defective product....To also require proof of negligence would raise nearly insurmountable barriers, involving the difficult and costly task of gathering evidence on the manufacturer's state of mind from the one who is perhaps the sole (and recalcitrant) possessor of that evidence -- the manufacturer." New York Times, Sunday, September 1, 1985.

[18] Senate Bill 1999. See, Congressional Record - Senate S-18321 (December 20, 1985).

(f) McConnell Bill.

The McConnell Bill[19] was introduced in February of 1986 and applied to all tort actions filed in the federal court. It would cap awards for pain and suffering at $100,000, eliminate the collateral source rule, limit the award of punitive damages, and limit contingent fees. According to one columnist, the McConnell Bill would, "clamp down on litigation."[20] After introduction, the McConnell Bill was referred to the Senate Judiciary Committee.

(g) Report of the "Tort Policy Working Group".

The Administration's "Tort Policy Working Group" issued its report in February of 1986.[21] This Administration study recommended the abolition of strict liability, elimination of joint and several liability, imposition of a $100,000 cap on "non-economic damages", periodic payment of future economic damages, abolition of the collateral source rule, and restriction of contingent fees.[22]

(h) Kasten Amendment.

In April of 1986, the Kasten Amendment was introduced with the support of the Reagan Administration. Also referred to the Senate Commerce Committee, the Kasten Amendment would abolish joint and several liability, limit "non-economic damages" to $100,000, provide for periodic payments of future economic loss in excess of $100,000, abolish the collateral source rule, and limit contingent fees.[23]

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[19] Senate Bill 2046, introduced February 5, 1986. See, Congressional Record - Senate S-1008 (February 5, 1986).

[20] Kilpatrick, The Charlotte Observer, p. 13A (February 22, 1986).

[21] See, "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability."

[22] The Tort Policy Working Group's recommended maximum contingent fee is 25% of the first $100,000, 20% of the second $100,000, 15% of the third $100,000, and 10% for all above $300,000. See Report of Tort Policy Working Group, page 72.

(i) Danforth Substitute Amendment.

In May of 1986, Senator Danforth introduced a substitute amendment which was referred to the Senate Commerce Committee. Called the "Product Liability 'Reform' Act",[24] the Danforth Amendment provided for a so-called "expedited settlement claim" procedure[25] under which the claimant may recover "net economic loss"[26] and so-called "dignitary loss" not to exceed $250,000. The Bill also contained provisions for binding arbitration, restricted punitive damages and joint and several liability, and contained a shortened statute of limitations and a statute of repose.

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[23] Senate Bill 1814. See, Congressional Record - Senate S-5106 (April 30, 1986).

[24] See, Congressional Record - Senate S-5770 (May 12, 1986).

[25] Under this procedure, the claimant would be required to submit to the product manufacturer "a detailed description of the product", "full information" regarding the occurrence and injury, copies of all medical bills and medical reports, a statement of the claimant's employment history and earnings, copies of all witness statements, and the amount of all compensation received by the claimant. In addition, the claimant must "cooperate fully and expeditiously with the manufacturer" in its investigation, promptly update all medical information, furnish copies of records of "any relevant medical treatment or examination of the claimant", submit to a physical or medical examination, or both, by a health provider specified by the manufacturer, provide copies of all expert opinions, and provide the manufacturer with a "reasonable opportunity to inspect, photograph or test" the product. For all this information, the claimant receives absolutely nothing in return.

[26] After deduction for "collateral source payments".

(j) Senate Commerce Committee proposed "Product Liability 'Reform' Act".

Public hearings were held on the Danforth and Kasten Amendments and a revised amendment by Senator Gorton on May 20, 1986. At these hearings, representatives of the Administration[27] and the manufacturing and liability insurance industry testified in favor of these Bills while consumer groups and a representative of the judiciary testified in opposition.[28]

Following these hearings and "stepped-up lobbying by business groups",[29] the proposed "Product Liability 'Reform' Act" was reported out of the Senate Commerce Committee in June of 1986 by a final vote of 10-7. Designated Senate Bill 2760,[30] the principal provisions of the Bill are as follows:

1. Abolition of the collateral source rule. By virtue of the so-called "expedited product liability

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[27] Testifying for the Administration in support of the Bill were Attorney General Meese and Commerce Secretary Balderidge.

[28] Chief Justice Carrico of Virginia, testifying on behalf of the Conference of Chief Justices, testified that the Bills would inevitably create "a legal thicket" and that the burden of untangling it "if it can be untangled at all, will lie only with the Supreme Court of the United States". Transcript, pp. 173:24 through 174:2.

[29] See, "Plans for Product Liability Bill Generate Consensus Among Senate Panel Members", Wall Street Journal, p. 12 (May 21, 1986).

[30] See, 99th Congress, Second Session, Senate Bill 2760 (Calendar Number 856) dated August 14, 1986, together with Senate Commerce Committee Report on the proposed "Product Liability 'Reform' Act" with additional minority views dated August 15, 1986.

settlements" provisions,[31] regardless of the extent of the product related injury, a product manufacturer may make an offer of settlement of $100,000 in so-called "dignitary loss"[32] and thereby limit the victim's recovery to "dignitary loss" plus "economic losses" less "collateral benefits".[33] "Collateral benefits" are defined to include "all benefits and advantages received or entitled to be received" by the victim[34] under state or federal law[35] or under any life, health, accident, or disability insurance policy.[36]

2. Caps on Damages. By making an offer of settlement for this so-called "dignitary loss", the product manufacturer can limit the product victim's recovery in the most serious cases[37] to a maximum of $250,000 of "non-economic"

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[31] See, Title II, §§ 201-206.

[32] "For the purpose...of this Act, 'dignitary loss' means non-economic loss resulting from harm caused by a product, compensible under state law, in the amount of $100,000, and consisting of pain and suffering or mental anguish associated with (A) the death of a parent, child or spouse; (B) serious and permanent disfigurement; (C) loss of a limb or organ; or (D) serious and permanent impairment of a bodily function." § 102(6).

[33] See, § 102(3) "Collateral Benefits" and § 102(11) "Net Economic Loss".

[34] For the purpose of this Bill, if a severely injured product victim later dies as a result of his injuries, the claims of the victim for conscious pain and suffering and of his estate for grief, sorrow, and loss of companionship are treated as one claim with one damage cap. The same applies to claims of the parent of an injured child. See, § 102(1).

[35] Including Workmen's Compensation. See, § 307.

[36] Or any "wage or salary continuation plan" or "as a result of participation in any prepaid medical plan or health maintenance organization."

[37] In cases not involving "dignitary loss" as defined in Footnote 32, "non-economic loss" would be limited to "two
(Footnote Continued)

damages, plus "net economic loss": "economic loss," less all "collateral benefits" which the manufacturer "reasonably anticipates the claimant will receive from collateral sources."[38] If the product victim is so severely injured that he later dies as a result of his injuries, this "cap" on "non-economic damages" of $250,000 would include both the victim's claim for conscious pain and suffering, regardless of its length or severity, and the claims of his wife and children for grief, sorrow, and loss of companionship.[39] This arbitrary cap on damages would apply in all cases, regardless of circumstances:

> "Under the settlement system established in Title II of the Committee Bill, manufacturers guilty of the most flagrant wrongdoing and those responsible for the most grievous injuries would be able to place a fixed limit on their own liability. Their victims, no matter how badly injured and no matter

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(Footnote Continued)
times claimant's economic loss or $50,000, whichever is less." See, § 204(c)(2). This could, of course, be zero. See, Illustrations #3 and #4 below.

[38] "Where harm occurs in circumstances that might entitle a claimant to benefits...which would reduce the amount of the claimant's net economic loss...and it cannot reasonably...be determined whether or in what amount such benefits will be payable, the defendant shall place in an interest-bearing escrow account that portion of the economic loss which the defendant reasonably anticipates the claimant will receive from collateral sources, until the claimant's right to such benefits and the amount of such benefits finally has been determined under applicable law." § 102(b)(2).

[39] According to the minority views of Senator Albert Gore, Jr., "to compund this injustice, the real recovery limit that this system would create if put into practice would not be $250,000, but the $100,000 included in each settlement offer. Knowing that the long and grueling process of litigation would bring no more than $150,000 more than the initial settlement offer, even the most severely injured victims would feel compelled to accept the initial offer despite its inadequacy. As a result, Title II would in reality impose a $100,000 cap on the non-economic loss recoveries of the injured victims." Minority Views of Senator Gore. See Report, supra, Note 30, page 118.

> how strong their cases, would, by definition, be undercompensated; manufacturers would be able to avoid the full cost of injuries their dangerously defective products created...."[40]

3. *Periodic Payment of Future Damages*. Notwithstanding universally recognized rules of state tort law currently requiring that future damages be reduced to their present cash value,[41] the so-called "Product Liability 'Reform' Act" would permit the product manufacturer to withhold payment until "30 days after the date on which reasonable proof of the fact and amount of net economic loss incurred is submitted."[42] Therefore, each time further medical or other expenses are incurred by the victim, a new source of potential controversy arises.[43] As each item of future economic

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[40] Minority Views of Senator Gore. See Report, *supra*, Note 30, page 117. See, also, Minority Views of Senator Daniel K. Inouye: "A cap [on damages] ...amounts to telling a victim that, as a matter of Congressional policy, the pain that the has suffered or quality of life that he has lost is only worth $150,000, $250,000 or some arbitrary figure selected because it sounds fair. *I believe that this is unjust to the point of absurdity*...." See, Report, *supra*, Note 30, page 116, emphasis added.

[41] See, e.g., *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1017 (1916); *Restatement of Torts, 2d*, § 913A; 25A *C.J.S.*, Damages, § 194, p. 259; *AmJur*, Damages, §§ 26-29; Stein, *Damages and Recovery, Personal Injury and Death Actions*, "Reduction to Present Value", Chapter 11, pp. 327-346 (Lawyers Co-op, 1972).

[42] § 205(a), p. 21, lines 3-9.

[43] See, Minority Views of Senator Slade Gorton who stated: "This settlement system, rather than reducing transaction costs, is likely to increase them significantly. Many new issues that are material to the parties' rights and which will be litigated in almost every case are created -- ...what is a reasonable economic expense and reasonable proof thereof? Section 205 provides for payment of net economic loss periodically, as it accrues, upon presentation of reasonable proof of the fact and amount of net economic
(Footnote Continued)

loss is incurred by the product victim, the product manufacturer is given the option to claim that "a material and substantial change of circumstances has occurred" based upon "newly discovered evidence concerning the claimant's physical condition, loss, or rehabilitation."[44]

4. Abolition of the Product Seller's Liability for Defective and Unreasonably Dangerous Products. The rule of implied warranty that a fair price warrants a sound product is a fundamental concept of the Uniform Commercial Code[45]

(Footnote Continued)
loss. This presents at least three issues for debate. What is recoverable as economic loss? ...Was the economic expense reasonable as required in the definition? And, was the proof of the fact and amount of the loss incurred reasonable?" Report, supra, Note 30, page 102.

[44] § 205(b)(2). In addition, "if a period of five years has elapsed after the most recent claim for payment is made..., the claimant shall not be entitled to receive payment for any addtional net economic loss...." § 205(c). Concerning this provision, Senator Slade Gorton stated: "A second aspect of this proposal that is particularly disturbing is the provision which terminates the plaintiff's right to payment for net economic loss if a claim for such a payment has not been made within five years. Anyone familiar with cases arising under the states' Workers' Compensation plans knows that it is not unusual to have a five year period in which a diligent and hardworking plaintiff can return to work only to have the cumulative impact of the harm cause a subsequently debilitating condition. As a result, the incentive created by this settlement system is to malinger and continue to incur costs simply to guarantee future potentially vital payments." Report, supra, Note 30, page 102.

[45] See, Uniform Commerical Code, §§ 2-314 and 2-315. § 2-315 provides that "where the seller...has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment to select or furnish suitable goods, there is...an implied warranty that the goods shall be fit for such purpose." This rule can be traced back to the Code Napoleon of 1804. "The vendor is bound to warranty by reason of concealed defects in the thing sold which render it unfit for the use to which it is destined...." Code Napoleon, § 1641. For a
(Footnote Continued)

and has been adopted in all 50 states.[46] The rule adopted by the American Law Institute in the Restatement of Torts that a product seller is liable for personal injury caused by the defective and unreasonably dangerous nature of its products[47] has been adopted in 46 of the 50 states.[48] Both of these equitable and beneficial rules would be abolished by the so-called "Product Liability 'Reform' Act".[49] In addition, regardless of his own independent knowledge of the dangerous nature of the product, a product seller could be held liable for failure to warn only if he failed to pass on "written warnings or instructions received while the product was in the product seller's possession and control."[50]

5. Abolition of the Doctrine of Joint and Several Liability. Under existing law,[51] the rule of joint and

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(Footnote Continued)
history of the doctrine of implied warranty in the United States, see 2 Squillante & Fonseca, Williston on Sales, §§ 15-19 through 15-23, pp. 387-412 (Lawyers Co-op, 1974).

[46] See, 3 Williston on Sales, supra, Note 45, Chapters 18 and 19, pp. 57-144.

[47] "One who sells any product in a defective condition unreasonably dangerous to the user or consumer...is subject to liability for physical harm...." Restatement of Torts, § 402A.

[48] The exceptions are Massachusetts, North Carolina, Virginia, and Wyoming.

[49] § 302(a) limits the product seller's liability to independent acts of negligence or breach of express warranty "independent of any express warranty made by [the] manufacturer."

[50] § 302(b). Proof that the product seller knew of the danger or that he received oral warnings from the product manufacturer or written warnings from some other source would not be sufficient to establish liability.

[51] The doctrine of joint and several liability can be traced back to the laws of ancient Rome. See, e.g., League, Roman Private Law, pp. 345-347 (1906); Buckland, A Manual of
(Footnote Continued)

several liability[52] is applicable where the wrongful acts of two or more parties combine to cause "a single and indivisible harm to the injured party."[53] This rule applies only when there is a "single and indivisible" injury[54] and only where the conduct of each party is "a substantial factor in bringing about the harm."[55] In other words, but for the conduct of the product manufacturer the injury would not have occurred.[56] This longstanding beneficial common law

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(Footnote Continued)
Roman Private Law, § 141, p. 349 (1939); and Scott, The Civil Law, Vol. IV, p. 84 (Joint and Several Liability of Surveyors) and Vol. VI, p. 147 (Joint and Several Liability of Guardians) (1932). Scott traces joint and several liability to the Edicts of Ulpian, a Roman jurist in the early 3rd Century A.D. See, generally, Encyclopedia Britannica - Micropedia, Vol. X, p. 245 (1979).

[52] See, generally, Restatement of Torts, 2d, §§ 875-881, and 86 C.J.S., Torts, § 34.

[53] Restatement of Torts, 2d, § 875.

[54] "This section [§ 875 of the Restatement of Torts, 2d] is concerned only with harm that is not divisible. If the tortious conduct of two or more persons has contributed to the harm in such a manner that each is a legal cause of it, the liability is not apportioned and each is liable for the entire harm." Restatement of Torts, 2d, § 875, Comment b., page 315.

[55] Restatement of Torts, 2d, § 431. See, also, Minority Views of Senator Albert Gore, Jr., who states: "More significantly, joint and several liability applies only when there is an indivisible harm resulting from the conduct of more than one party. A victim suffers indivisible harm in any situation where multiple parties engage in injurious conduct, yet the conduct of any one of the parties in itself could cause the entire injury, or the conduct of each of the parties is an essential factor in the injury. By definition, the degree of responsibility for indivisible harm cannot be divided among defendants in a logical fashion." See, Report, supra, Note 30, page 122, emphasis added.

[56] Senator Gore attributed this example to Senator Gorton: "An individual driving an unstable Jeep loses
(Footnote Continued)

doctrine would be abolished by the so-called "Product Liability 'Reform' Act" with respect to "non-economic loss".[57]

> "Section 308 of the Committee Bill eliminates the common law doctrine of joint and several liability for all non-economic losses. That provision will discourage settlements. It will also expand, complicate and thereby increase the cost of litigation. Most important, the provision will deprive innocent victims who suffer non-economic damages of full recoveries for their injuries."[58]

Under other provisions of this Bill, the elimination of product victims' rights would be limited to "non-commercial loss,"[59] a "uniform statute of limitations" of two years is

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(Footnote Continued)
control while trying to avoid an oncoming drunk driver, on a poorly designed and maintained roadway. In contrast, the doctrine of joint and several liability does not apply to situations where responsbility can be apportioned...." Report, supra, Note 30, page 122.

[57] See, § 308.

[58] Minority Views of Senator Albert Gore, Jr. See, Report, supra, Note 30, page 122, emphasis added. "This revision of the joint and several liability doctrine will prohibit a victim from recovering for any harm committed by a potential defendant that has not been sued. Consequently, section 308 encourages victims to identify and sue each and every party that might be remotely responsible for the injury. That change will increase the number of parties before the court, the number of issues and motions to be resolved, the cost of litigation, and, in many instances, the complexity of a given case." Id. at page 123.

[59] "...A civil action brought against a manufacturer or product seller for loss or damage to a product itself or for commercial loss is not subject to this Act and shall be governed by applicable commercial or contract law." § 103(a). Therefore, the rights of one big business against another big business are protected. It is also interesting to note that no peculiar defense available to product manufacturers under the laws of the several states are affected. Only "human rights" are abolished.

imposed,[60] a "statute of repose" is adopted,[61] and sanctions are imposed on attorneys "whose conduct in the course of such action is calculated to delay resolution of the action."[62]

(k) Summary of "Additional and Minority Views" of the Senate Commerce Committee.

The inequity and absurdity of these so-called "reforms" is demonstrated by the "additional and minority views" of members of the Senate Commerce Committee:

1. Senator Ernest F. Hollings of South Carolina, a long-time opponent of this legislation, stated:

> "The Product Liability Reform Act is unwise federal legislation. It would preempt 200 years of common law development in the state courts and legislatures without sound statistical data or evidence to support a crisis in product liability. I urge my colleagues to reject it.

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[60] See, § 304(a). The statute of limitations sets the time permitted by each state as a matter of state policy in which an action must be commenced following the occurrence and discovery of an injury. See, generally, Frumer & Friedman, Products Liability, Vol. 3A, § 39, and Cartwright & Phillips, Products Liability, Vol. III, § 9.11 et seq. (1986).

[61] Twenty-five years after delivery of the product for "captial goods" and a presumption of ten years for the product's "useful safe life" for non-capital goods. § 304. This "useful safe life" presumption would apparently apply, regardless of how unsafe the product is and the number of product victims killed or maimed during its so-called "useful safe life". As to the questionable constitutionality of statutes of repose, see Cartwright & Phillips, supra, Note 60, Volume III, § 914, pp. 1161-1167.

[62] § 305. In practice under this Section, any plaintiff's attorney who declines an "offer of settlement" from the product manufacturer, or otherwise attempts to vigorously represent his client as required by the Canons of Ethics, will be threatened with sanctions, including "the total amount of court costs, fees, and expenses (including attorney's fees) reasonably attributable to [such] conduct." This is one more subtle way in which the product liability
(Footnote Continued)

* * *

> "...We don't know the burden we would create for the state courts to administer such legislation. We don't know how it would affect the development of safe and reliable products. In other words, the Committee has chosen to close its eyes, say a few prayers, and go for broke....The Product Liability Reform Act represents a recklessness this nation cannot afford. If we must attempt to tinker with the product liability system, then let us do so armed with the facts and with an eye toward the protection of our society from unsafe and dangerous products."[63]

2. Senator Ted Stephens of Alaska, a "supporter of prior legislative efforts favorably reported from the Committee" stated:

> "Severe injury cases require that the limit of $250,000 on noncompensatory damages be raised substantially, or waived altogether....Some individual cases might be well discharged under the alternative claim resolution structure, but there are injuries or accidents due to defective products which cause dire emotional suffering, where the Committee Bill's cap would be entirely inappropriate."[64]

3. Senator John D. Rockefeller, IV, of West Virginia, who voted in favor of the Bill, referred to what he called the "blatant unfairness of the $250,000 cap in cases of catastrophic injury" and stated:

> "...I strongly object to the $250,000 cap that the Committee has placed on pain and suffering recoveries where a catastrophically injured plaintiff rejects a defendant's settlement offer. ...A victim who has succeeded in convincing a jury of both a manufacturer's liability and of the

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(Footnote Continued)
"reformers" are attempting to limit the injured victims' rights to effective counsel.

[63] Minority Views of Senator Ernest F. Hollings. Report, supra, Note 30, pages 104 and 114.

[64] Additional views of Senator Ted Stephens. Report, supra, Note 30, page 98.

> severity of his or her own injury should not then find himself denied the full compensation the jury believes is his due. In a range of tragic cases, where people suffer permanent damages to their bodies or faculties, the $250,000 may be nowhere near sufficient.
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> * * *
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> "...By working in an information vacuum, the proponents of the cap only dramatize the arbitrariness of a legislative fiat that would limit recoveries, regardless of the facts of a case.
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> * * *
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> "...Congress must tread carefully on substituting its judgment for the collective wisdom of twelve jurors who have heard the facts of a specific case -- particularly in those instances where we are treading on the rights of the severely injured."[65]

4. Senator Slade Gorton of Washington, a long-time supporter of so-called "Product Liability 'Reform'" stated:

> "...The irony of this system is that a severely injured plaintiff who rejects a settlement offer and wins at trial -- loses....The incredible injustice of the system is that the greater the plaintiff's loss, the greater the incentive for the defendant to make such an inadequate offer and the higher the penalty on the winning plaintiff.
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> * * *
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> "...The settlement process of this Bill is fundamentally flawed; it expedites settlements only by depriving plaintiffs of a fair and impartial resolution of their claims...."[66]

5. Senator Daniel K. Inouye of Hawaii stated:

> "A cap [on damages] ...amounts to telling a victim that, as a matter of Congressional policy, the pain that he has suffered or quality of life he

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[65] Additional views of Senator John D. Rockefeller, IV. Report, supra, Note 30, pages 99-100.

[66] Minority Views of Senator Slade Gorton. See, Report, supra, Note 30, page 101, 103.

> has lost is only worth $150,000, $250,000, or some arbitrary figure selected because it sounds fair. I believe this is unjust to the point of absurdity...."[67]

6. Senator Albert Gore, Jr., of Tennessee, a co-sponsor of previous products liability legislation, stated:

> "...The Committee Bill...fails to assure justice, fairness and adequate compensation for those injured by defective products....
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> * * *
>
> "...The legislation would do much to discount the potential liability of makers and marketers of dangerously defective products; it would do little to protect the interests of those injured by such products and of consumers in general.
>
> "The Committee Bill would: (1) enable the makers of dangerous or defective products to impose a cap on compensation for pain and suffering, even when negligent behavior causes severe injury; (2) alter the doctrine of joint and several liability and thereby reduce the ability of victims to recover fully for their injuries; (3) make it more difficult for plaintiffs to recover punitive damages; (4) limit plaintiffs' ability to hold product sellers responsible for marketing unreasonably dangerous or defective products....
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> * * *
>
> "Taken together, the settlement procedure in Title II and the several liability rule in Section 308 effectively leave injured persons without anything approaching fair compensation for pain and suffering...."[68]

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[67] Minority Views of Senator Daniel K. Inouye. See, Report, supra, Note 30, page 116, ¶6.

[68] Minority Views of Senator Albert Gore, Jr. See, Report, supra, Note 30, pages 117 and 124.

(1) Some Illustrations of the Practical Application of the "Product Liability 'Reform' Act".

The inequity and absurdity of these so-called "reforms" is further demonstrated by reference to the practical effect of this proposed legislation shown in hypothetical illustrations of eight typical product liability actions.

Illustration #1. Collateral Source Rule. A self-employed, 46-year-old welder received second and third degree burns over 70% of his body when his defective butane lighter exploded.[69] After three weeks of the most exquisite pain,[70] he died, leaving a distaught widow and five hungry children ranging in age from 7 to 17. His "economic losses" include $150,000 in hospital expenses and $50,000 in lost future wages.[71] Although his hospital insurance paid only $50,000, his widow was able to pay the remainder of his hospital bills from the proceeds of a $100,000 life insurance policy upon which they had scrimped and saved to pay the premiums for the previous 20 years. As a result of his death, the family is without any source of income and are, therefore, eligible for welfare, food stamps, and Social Security benefits under state and federal law having a present value of $50,000. Although the family's total "economic losses" are $200,000, they have received "collateral benefits" of $150,000 and are "entitled to receive" additional "collateral benefits" of $50,000. Consequently,

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[69] "According to Consumer Product Safety Commission figures, since 1981, there have been more than 3,000 injuries related to lighters annually. Also since 1981, the CPSC has recorded 35 deaths associated with lighters....At least six of the deaths resulted from exploding lighters." "Butane Lighters", 22 *Trial* 19 (March, 1966).

[70] In burn injuries such as this, the raw skin of the burn victim is scrubbed daily to prevent infection.

[71] Reduced to cash value as required by existing law. See, Footnote #41 above.

THEIR NET ECONOMIC LOSS IS ZERO under the so-called "Product Liability 'Reform' Act".

Illustration #2. Caps on Damages. A 19-year-old auto mechanic is rendered quadriplegic as a result of a defective transmission in a Ford automobile.[72] His medical expenses and loss of future earning capacity are more than offset by "collateral benefits" from Workmen's Compensation, insurance, and Social Security. Although he has been deprived of every conceivable enjoyment of a normal, healthy and happy life, he still has a life expectancy of 53 years. His maximum recovery under the so-called "Product Liability 'Reform' Act" against this mammoth motor company which has proven time and again to be absolutely indifferent to human safety is only $250,000 -- less than $5,000 per year for each of the 53 years which he has been condemned to live in utter despair.

Illustration #3. Caps on Damages and "Dignitary Loss". The same facts as in Illustration #2 above, except that the 19-year-old auto mechanic is killed instantly, survived by three brothers and two sisters, none of whom had received financial support from him during his lifetime. Since he was killed instantly, he had no medical expenses. Since his survivors received no financial support from him, they suffered no "economic loss" from loss of earning capacity under the wrongful death statutes of most jurisdictions.[73] Since he was not survived by a "parent, child or spouse", his wrongful death beneficiaries suffered no "dignitary loss".[74] Therefore, their maximum recovery for "non-economic loss" would be limited to "two times the claimant's economic loss or $50,000, whichever is less."[75] Assuming that his funeral expenses were $2,500, their total recovery for this tragic loss would be limited to a maximum of $5,000.

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[72] "As of July 1985, an estimated 306 deaths were caused by defective transmissions in Ford cars; injuries from the defect are estimated to be far in excess of 5,000. If these cars had been recalled as consumer advocates and the federal regulatory agency urged in 1980, almost half of these casualties could have been prevented." "The Assault on Personal Injury Lawsuits: A Study of Reality vs. Myths", p. 36 (Public Citizen, August, 1986), citing U. S. Department of Transportation, National Highway Traffice Safety Administration, "Center for Auto Safety Petition on Ford Transmissions", (Docket #P85-15); "ODI Staff Report", July 3, 1985. "The 306 deaths were reported by NHTSA as definitely or possibly related to the defective transmission. Substantially more deaths have been reported since July, 1985." Public Citizen, supra, page 36.

Illustration #4. Caps on Damages, "Dignitary Loss", Deprivation of Right of Jury Trial. A young lady, working in her father's meat market, loses her ring finger on her left hand while cleaning a meat tenderizer. Her injury occurred because the machine was not equipped with a safety interlocking device which shuts off all power to the machine when the cover is raised for cleaning purposes.[76] The manufacturer offers to settle for net economic loss, claiming that the victim suffered no "dignitary loss" because she suffered "no loss of a limb or organ" and no "serious and permanent impairment of a bodily function."[77] Due to the abolition of the collateral source rule, plaintiff's "net economic loss" is zero.[78] Since the manufacturer has made an "offer of settlement," the victim is automatically deprived of her constitutional right to a jury trial.[79] The judge determines that the victim has suffered no "dignitary loss." Assuming her hospital bills were $1,500, her MAXIMUM TOTAL RECOVERY is $3,000 under the so-called "Product Liability 'Reform' Act".[80]

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[73] See, generally, Stein, Damages and Recovery, Personal Injury and Wrongful Death Actions, § 261, p. 582-587 (1982).

[74] See, "Product Liability 'Reform' Act", supra, Note 30, § 102(a)(6).

[75] See, § 204(a)(2), proposed Act, supra, Note 30.

[76] Safety interlocking devices have been a part of the "state of the art" for more than 100 years. The first safety interlock was patented in 1868 (Patent #84,795 granted to Henry Carse of Pittsburgh, Pennsylvania). By 1925, more than 75 safety interlocking devices had been patented in various applications. See, generally, Roberts, Machine Guarding (Institute for Product Safety, 1980).

Illustration #5. Periodic Payment of Future Damages. A defective grinding wheel in a machine shop disintegrates, partially blinding a young machine shop worker.[81] As a result, he is disabled from future employment in the machine shop, but obtains employment as a night watchman with a substantially lower salary. As he suffers constantly from headaches, he requires medication and is required to see his doctors at regular intervals. Each time he submits what he considers to be "reasonable proof of the fact and amount of economic loss" to the defective product manufacturer, a new controversy arises. The product manufacturer first claims that the "proof of the fact and amount of net economic loss" is not reasonable, then that the expenses were not reasonably required, then that they were related to some other condition or cause, and last, that it has "newly discovered evidence" that a "material and substantial change of circumstances has occurred." On each such occasion, the victim is required to hire a lawyer and go back to court to get each new dispute resolved.

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[77] See, definition of "dignitary loss" in § 102(a)(6) in proposed Act, supra, Note 30.

[78] See, § 204(b) of proposed Act, supra, Note 30, and Illustration #1 above.

[79] See, § 204(c)(1) of proposed Act, supra, Note 30.

[80] Under § 204(c)(2), if no "dignitary loss" is suffered "the claimant's non-economic loss" shall not exceed "two times the claimant's economic loss or $50,000, whichever is less." [emphasis added].

[81] For a list of 48 reported appellate court cases dealing with exploding grinding wheels, see Frumer & Friedman, Products Liability, Vol. 4, pp. TC405-09, and Supplement, p. 66.

Illustration #6. Abolition of Actions for Implied Warranty and Strict Liability Against the Product Seller, Shortened Statute of Limitations. A farmer buys a "knapsack sprayer" at his local Sears store. While spraying his peach trees, the chemical spray leaks through a defective weld in the bottom of the sprayer, causing serious chemical burns to the victim's back and legs. Although the victim relied upon the Sears reputation in making his purchase, he later learns that the sprayer was made for Sears by a small product manufacturer in a distant state. Since he can prove no independent act of negligence on the part of Sears, he sues the manufacturer only.[82] After extensive discovery, he learns that the product manufacturer cannot respond to a judgment. By this time, the shortened two-year statute of limitations has run and the defective product victim is left without a remedy.[83]

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[82] Had he initially sued Sears under such circumstances, his attorney would subject himself to heavy sanctions under the Act. "Any...attorney shall be liable [for costs, fees and expenses (including attorney's fees)] ...if the court finds that such attorney commenced a civil action subject to this Title...without a good faith belief by such attorney that there was a reasonable basis in law and in fact for recovery of the damages...." See, proposed Act, supra, Note 30, § 305(b)(2).

[83] Although the product seller may be liable under § 302(c) if "the court determines that the claimant would be unable to enforce a judgment against the manufacturer", § 304(a) provides that "any civil action subject to this Title shall be barred unless the complaint is filed within two years". See, proposed Act, supra, Note 30.

Illustration #7. Abolition of Joint and Several Liability for "Non-Economic" Damages, Shortened Statute of Limitations. A young housewife is severely injured in an automobile accident resulting from brake failure on her new automobile.[84] Her resulting injuries include "serious and permanent disfigurement", amputation of one leg, loss of one eye, and the loss of the ability to bear children, qualifying her for the maximum non-economic "dignitary loss" of $250,000. Her medical expenses are fully covered by her husband's medical insurance, so she has no "net economic loss" under the proposed Act. After an extended period of recuperation, she hires a lawyer and institutes an action against the automobile manufacturer. The automobile manufacturer's defense is that another independent supplier manufactured the defective brakes.[85] Fortunately, the victim has time before the expiration of the statute of limitations to name the brake manufacturer as a defendant. However, the brake manufacturer's defense is that another independent supplier manufactured the defective brake shoes which caused the brakes to fail. By this time, the statute of limitations has run and the brake shoe manufacturer is immune from suit. Without the brake shoe manufacturer's participation to defend against the claims of the brake manufacturer, the jury finds this non-party 90% responsible. Therefore, the victim's maximum recovery against the automobile manufacturer and the brake manufacturer for this horrendous injury is only $25,000.[86]

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[84] Cf. Comstock v. General Motors, 358 Mich. 163, 99 N.W.2d 627, 78 A.L.R.2d 449 (1959).

[85] Under existing law, the automobile manufacturer would be liable for defective component parts manufactured by others. See, e.g., Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963) [defective dimmer switch]; Cartwright & Phillips, Products Liability, Vol. 1, § 3.12-3.13, pp. 277-281 (1986).

Illustration #8. Exclusion of Commercial Loss.[87] The same facts as Illustration #7, except that the automobile manufacturer is suing the brake manufacturer and/or the brake shoe manufacturer for "commercial loss"[88] caused to the automobile manufacturer because of the defective brakes. The automobile manufacturer, excluded from the punitive provisions of the so-called "Product Liability 'Reform' Act", is entitled to enjoy the full benefits of the applicable state statute of limitations, a jury trial on all issues of fact, the benefits of the collateral source rule and joint and several liability, and, best of all, no caps on recovery.

(m) Abolition of the Right of Trial by Jury.

These eight illustrations show some of the gross inequities that would result from the passage of this Act. Many others could be demonstrated by additional illustrations. But the greatest evil of all is what it would do to the constitutional right of trial by jury previously enjoyed by all American citizens:

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[86] "In any product liability action, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to such defendant in direct proportion to such defendant's percentage of liability....A separate judgment shall be rendered against such defendant for that amount." Proposed Act, supra, Note 30, § 308(a).

[87] See, Footnote #59 above.

[88] "'Commercial loss' means economic injury...incurred by persons regularly engaged in business activities consisting of providing goods or services for compensation." See, proposed Act, supra, Note 30, § 102(a)(5). In other words, "big business".

1. By abolishing the collateral source rule, the Act effectively abolishes the right of most product victims to recover for their medical expenses and loss of wages. As to what little "net economic loss" may be left, their right to a jury trial on this issue is abolished by placing all such questions in the hands of the judge.[89]

2. The right to a jury trial as to non-economic loss is effectively abolished as to most product victims by placing arbitrary caps on damages, regardless of the extent of the injury,[90] and by placing all questions as to the existence of so-called "dignitary loss" in the hands of the judge.[91]

3. The traditional right to a jury trial as to the liability of the product seller for sale of a defective and unreasonably dangerous product or for failure to warn of a known danger is effectively denied by abolishing such liability altogether.[92]

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[89] See, proposed Act, supra, Note 30, § 201(g) and 202(a). This would also include issues as to "change in circumstances" with respect to future damages. See, § 205(b)(2).

[90] See, proposed Act, supra, Note 30, § 102(a)(6) and 204(c).

[91] See, proposed Act, supra, Note 30, § 204(c)(1). Such factual issues would include whether disfigurement was "serious and permanent", whether the victim suffered an impairment of bodily function and whether such impairment was "serious and permanent". Temporary disfigurement and temporary impairment of bodily function are apparently not regarded as compensible: e.g., temporary loss of eyesight ultimately restored; temporary colostomy; temporary inability to walk, etc.; regardless of duration so long as not "permanent".

[92] See, proposed Act, supra, Note 30, § 302(a).

(n) Conclusion.

For the past 200 years, our judicial system has been built upon the principle of equal justice to all Americans. The right to equal justice, just compensation, and our constitutional right to trial by jury are among our most precious freedoms. All are now in serious danger. To preserve these rights, to protect the rights of thousands of product victims, to promote product safety,[93] and to ensure equity and justice,[94] we must join together to defeat this so-called "reform".

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[93] "With the opportunity to compete on the free market goes the duty to produce products that are not unreasonably dangerous as well as the responsibility to make reparation for any harm caused when that duty is neglected. Because we have a system which enforces this ideal, we can proudly state that ours is the safest nation on the planet....The Product Liability Reform Act represents recklessness this nation cannot afford. If we must attempt to tinker with the product liability system, then let us do so armed with the facts and with an eye toward the protection of our society from unsafe and dangerous products...." Minority Views of Senator Ernest F. Hollings, Senate Commerce Committee Report on Senate Bill 2760, supra, page 114. "As public policy, this system of incentives is appalling: it would create a cycle where the undercompensation of victims, and the attendant insulation of manufacturers from incentives for the marketing of safe products together lead to an increase in unsafe products on the market, and more undercompensated injuries. Most ominously, Title II would permit manufacturers of dangerously defective products to drive this cycle simply by making self-serving settlement offers." Minority Views of Senator Albert Gore, Jr., Senate Commerce Committee Report, supra, page 118.

[94] "...The wholly arbitrary character of the settlement system is illustrated by the fact that under this scheme, the pain and suffering associated with being rendered quadriplegic is worth no more than the pain and suffering associated with the loss of hearing in one ear. And the pain and suffering associated with being rendered quadriplegic in the year 2010 would be compensible in the same amount as loss of hearing in one ear in 1987, inflation notwithstanding." Minority Views of Senator Slade Gorton, Senate Commerce Committee Report, supra, page 101-102.

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September 11, 1986

Senator Mitch McConnell
120 Senate Russell Building
Washington, D.C. 20510

Re: Hearings on Senate Bill 2760

Dear Senator McConnell:

I apologize for my very inept answer to your question at the Senate Judiciary Committee hearing on Senate Bill 2760 on September 10.

Your question, I believe, was what was the primary goal of tort law. The primary goal of tort law is to provide compensation for the injured victim when the injured victim is able to establish liability under existing law. Under existing law, the injured victim can establish liability by proving his right to recover based on negligence, breach of implied warranty, or liability for manufacture and sale of an defective and unreasonably dangerous product under Section 402A of the Restatement of Torts.

I do not believe that Senate Bill 2760 accomplishes this goal because it will deny recovery of just compensation to product victims with meritorious claims under existing law. In addition, I believe it is universally accepted under existing law that unreasonable misuse of a product constitutes a valid defense. Therefore, Senator Kasten and Senator Luger's proposed amendment would have little, if any, effect.

I would appreciate it if this letter could be placed in the Record adjacent to my testimony and I apologize again for my inept attempt to answer your question at the hearing.

Sincerely yours,

J. Kendall Few

JKF:ber

cc: Senator Howell Heflin
✓Mr. Mike Ragan
Ms. Cindy Lebow

Senator McCONNELL. Thank you, Mr. Few.

I earlier had omitted putting my opening statement in the record, and we will do that at the appropriate place.

Mr. Habush, would it be accurate to say that you generally frown upon statutory interference with the development of the common law of torts, whether through Federal or State legislation?

Mr. HABUSH. I think that is true with respect to personal injury law, that the common law I feel is less subject to special interest pressures, including our own, and that tends to change more consistently with the view of society, at least as viewed by the judges.

I think when you put something into legislation, Senator, as you well know, it is easier to change than the common law and much more vulnerable to special interests, and I think for that reason the people who have less clout, which are the victims, have a better break with the common law than they would with special legislation.

Senator McCONNELL. Would you then characterize such statutory reforms as worker compensation, dram shop acts, elimination of contributory negligence, warranty statutes, black lung legislation, Superfund, either at the State or the Federal level, or similar acts as unwarranted interference in the unfettered development of the common law?

Mr. HABUSH. The answer is no, and I will tell you why, because you are going to say does that not sound inconsistent. And I do not have a photographic memory, so I am not sure I have all the bills that you have stated, but let me just talk about workers comp as one.

That was a piece of legislation that moved into an area where there was no recovery. Workers in America had no effective mechanism for suing negligent employers. It is one thing to establish legislation where there has been no common law recovery, and another thing to completely trash the common law for special interest groups.

Let me give you another example, wrongful death statutes. The common law came over from England, your tort or your cause of action died with you. There was no cause of action if you died, and so the States enacted wrongful death statutes which permitted people to sue for wrongful death.

So where there has been no recovery, I suggest that legislation is more than warranted. Where there has been law in existence which the legislature determines is egregious or which harms the people, I am willing to admit that the legislature and lawmakers, including lawmakers in Washington, have the right to view society as they see it and pass legislation in that regard.

Senator McCONNELL. So in effect such enactments improve the balance of the law by overturning inequitable or wrongful developments in the common law, in effect, would you not agree?

Mr. HABUSH. Yes, I think that can occur.

Senator McCONNELL. So ultimately, as you just indicated, it is our responsibility as elected officials to make those kinds of determinations, whether some kinds of adjustments are correct?

Mr. HABUSH. There is no question about that. But it is also, in all respect, the responsibility of all lawmakers to legislate on fact, not fiction, truth and not distortion, and not respond to hysteria over a crisis which has been created by the insurance companies and not the civil justice system.

Senator McCONNELL. Mr. Scott, as you may know, the topic of your presentation, alternative dispute resolution techniques, has a particular appeal to me. I have a bill in on a similar subject myself.

My legislation would encourage litigants to resort to such procedures as a means of reducing transaction costs and speeding the resolution of claims. In general, I find the procedure you outlined to be appealing, and evidently it has worked and I want to commend you for that.

A couple of followup points. The Wayne County approach limits itself to mediation.

Mr. SCOTT. That is correct.

Senator McCONNELL. Why not open up a broader range of ADR mechanisms that can be selected by the parties?

Mr. SCOTT. I see nothing wrong with that, particularly as they relate to—more as they relate to commercial disputes though as opposed to personal injury actions. I think mediation is the most effective tool for personal injury actions, but I see no objection to providing for a broad range of different opportunities.

Senator McCONNELL. I think you conceded that one weakness in the approach you all have used is the failure to deter frivolous or questionable liability cases. Why does the system disallow a ruling of no liability or, going further, why does it not permit the mediation panel to recommend sanctions for frivolous suits?

Mr. SCOTT. A very good question. I do not think I can answer the question as to why they do not permit a finding of no liability. Many of us defense lawyers have urged that it do so, to be frank, particularly because of frivolous cases. It is thought, however, that it is a settlement mechanism and so the mechanism utilized to identify a frivolous case is simply to put a low award on it. I do not personally agree with that. I think there should be the ability to make a finding of no liability.

Senator McCONNELL. You noted that 47 percent of the cases submitted to mediation have been settled. I am wondering how that compares to settlement rates in general.

Mr. SCOTT. I think the overall result of our mediation process probably is comparable to settlement rates in general. I do not have the statistics at hand, but I think it is near 90 percent in most cases, personal injury cases that is tend to settle. The beauty of the process is that it expedites the process, it is less costly to the parties, it takes it out of the court system completely, so that there is that mechanism and it is resolved earlier.

Senator McCONNELL. You probably covered this earlier. I had to leave the room for a few moments, but how much quicker do you think on the average that you are able to dispose of cases?

Mr. SCOTT. Well, we have reduced our docket in Michigan from 60 to 41 months now, from date of filing to disposition. I do not have statistics relating to mediation itself, but my judgment would be that in most mediation cases where they are accepted, they are resolved earlier than that.

Senator McCONNELL. If you could redraft the Wayne County procedure, what improvements would you make?

Mr. SCOTT. Well, one of the improvements that I would make is just the question that you asked, I would deal particularly with the frivolous lawsuit, the ability to identify those cases which are frivolous and recommend sanctions, I suppose, is one alternative, although I think that our court system in Michigan has adequate mechanism for dealing with that now. But I think the only thing I could add would be dealing with the frivolous lawsuit.

Senator MCCONNELL. As chairman of the Subcommittee on Courts, I may want to pursue this whole ADR issue a little more aggressively than we have in the past. Senator Heflin, of course, is the ranking Democrat on that subcommittee, and we are probably going to delve into that and we may want to hear you again on this subject at some time in the future.

Mr. SCOTT. I would be honored to appear.

Senator MCCONNELL. Mr. Few, would you say that the proper role of our tort liability system is to judge and punish wrongful civil conduct, or is it basically to compensate victims regardless of the actual fault of the defendant?

Mr. FEW. That sounds like two questions and I believe that the answer to that is that the goal of our civil justice system is, and has been since the seventh amendment, to give the individual party, both the plaintiff and the defendant, the right to come into court with a lawyer of their choosing and to present the facts in a court proceeding before a jury and have the jury determine whether, No. 1, the plaintiff is entitled to recover, and No. 2, if so, how much.

Now, under the existing system, which Senator Heflin mentioned, the American Law Institute, which was established in 1923, adopted the restatement of torts in 1937. This is the leaders of the American bar who did this and this is discussed in one of my pamphlets. In 1964, they recommended the adoption of 402(a) of the restatement of torts. That has now been adopted based on the recommendation of the American Law Institute in 46 States.

The Uniform Commercial Code's liability for breach of warranty has been adopted in all 50 States. This again was done by the States. That gives us three bases for responsibility. No. 1 is negligence, and that is traditionally recognized as being based on fault. No. 2 is based on breach of implied warranty, and that requires the plaintiff to prove that it was a defective and unreasonably dangerous product.

As a farm boy from South Carolina, I do not believe that you can, without fault, manufacture and sell a defective and unreasonably dangerous product. A gentleman from Massachusetts named Oliver Wendell Holmes agrees with me on that in his writing entitled "The Common Law" in 1881. He says the true basis of liability is not fault in the sense that man has a black heart, but it is fault in the sense that it gives the defendant the opportunity to, No. 1, foresee, and No. 2, avoid the harm to the injured party.

Now, as I show in here under existing law there are three types of foreseeability that have to be proved. These are uniform standards. Now, except that the strict liability is adopted in only 46 States, whereas breach of implied warranty is adopted in all 50, and this bill abolishes both of those beneficial doctrines as applied to the product seller and will in many instances leave the catastrophically injured product victim with no recovery whatsoever.

For example, I had a case where a gentleman went to Sears and, based on the reputation of Sears, bought a napsack sprayer which in turn leaked on the back of his legs and burned him badly. He relied on Sears, but under this bill you cannot sue Sears. You can only sue the manufacturer. Well, in that case the manufacturer came from a distant State and was unable to respond to judgment, so he would have been deprived of any rights.

Now, you ask a question about punishment, is it the intention of the civil system, if I understood you correctly, to punish the defendant. Since the Institutes of Justinian in 533 B.C. and the Twelve Tables of Rome in 450 B.C., it has been a principle of the law that if a person's conduct is so outrageous that it is appropriate that an example be made so that other people will not act, for the protection of society, that it is appropriate in an appropriate case to award exemplary damages.

Now, I can tell you that Steven Davis, of the American Bar Foundation—did I go beyond?

Senator HEFLIN. I do not believe I need this much history.

Mr. FEW. All right. I am sorry. Well, somebody said something about scholars and I do not know whether I am one or not.

Senator HEFLIN. Some of us have other things to do, too.

Mr. FEW. OK.

Senator HEFLIN. We are supposed to be in an impeachment proceeding right now, and I would appreciate if we could get this done expeditiously.

Senator MCCONNELL. Why do we not move along then. Senator Heflin.

Senator HEFLIN. I have several questions I want to ask. Senator McConnell and I are both on this impeachment panel and we are going to have to leave. But I am worried about several things in the bill that came out of the Commerce Committee.

One, a constitutional issue pertaining to the right of trial by jury. Mr. Habush, as I interpret this body of dignitary loss and the matter of an expedited settlement, if the judge determines the dignitary loss under this expedited settlement, then it is limited to $100,000, if it goes to a trial, the settlement goes to $250,000.

Under the settlement aspect, as my staff and I interpret this, that dignitary loss includes the death of a parent, child, or spouse, serious and permanent disfigurement, loss of limb or organs, and serious and permanent impairment of bodily functions.

Under this expedited settlement, the judge may either give you zero or give you $100,000. There is nowhere in between. This is how I interpret it, and what the staff tells me as well. Now, that means that if you are going to a jury trial, the judge has to determine whether or not one of those five things exist. Therefore, the question is whether that is a factual matter and is that a question that is a deprivation of a right to trial by jury?

Mr. HABUSH. Well, Senator, the extent to which people are coerced into taking settlements that would be contrary to what the evidence would support and a jury would find to the extent to which a jury's discretion is going to be limited by this bill to no more than $250,000 for all these terrible injuries, including all the categories that you talked about, that certainly is an impairment of people's rights to a trial by jury that is unrestricted, and I suggest is also a deprivation of the equal protection of laws for people who are injured by defective products and negligent manufacturers have one rule and people who are injured by other tortfeasors, such as drunk drivers, have another.

There are those such as Senator McConnell who would have all victims of tortfeasors restricted equally, but I do suggest to you that that is a deprivation of equal protection and a deprivation of the or a violation of the seventh amendment.

There has been about an equal split among the State supreme courts on the issue of restriction of pain and suffering in product liability cases and others and half of them have declared that unconstitutional and they have been sustained in other States.

Senator **Heflin**. Well, as I interpret this, it is left to the judge—for example, with serious and permanent disfigurement or serious and permanent impairment of a bodily function, a judge who will determine whether you get zero or $100,000 may consider a 1-inch scar as being a serious and permanent disfigurement and award $100,000, whereas a jury might give you $500 for it.

Mr. **Habush**. That is right, and the flip side is equally true. A judge may feel that a permanent and disfiguring scar on me is not worth anything, whereas someone might figure that a scar on a model is worth a great deal, but the problem is that a scar on a model would impair her economic loss substantially, and the economic loss may be offset by benefits she has received from workers' compensation and other things.

The problem with the $250,000 cap, if you refuse an offer, is that not only does it include the pain and suffering of the injured person, but it also includes the loss to society and the suffering of the spouses and the children and other derivative causes of action. And if you take some of the women, for instance, who suffered massive injuries, sometimes death and infertility from Dalkon Shields, these people have perhaps no economic loss and all they have is the loss which we call the dignitary loss, and under this bill, no matter how young, no matter how severe, no matter how distressed or depressed such a woman would be, she would be entitled to only $250,000, if she refuses an offer for $100,000, if she accepts an offer.

Senator **Heflin**. Well, if there is a liberal judge under a 10-percent permanent disability of some bodily function, say 10-percent disability of somebody's finger it appears to me that this bill is going to increase litigation and increase awards on the minor amendments with no discretion whatsoever.

I think it is going to mean judge shopping. If you find a good judge, whether it is a judge in a certain county in Alabama or somewhere else, every lawsuit in the world that might be worth $5,000 before a jury is going to be filed in that particular county. It looks to me like there is an absence of scholarship and thinking about this thing. I see massive lawsuits being filed. I know two or three judges in those little counties in Alabama and that is going to be the same thing as economic development for those little counties. [Laughter.]

This thing is going to be great for——

Mr. HABUSH. I think it is going to be—I agree with you, Senator.

Senator HEFLIN. Now, you big lawyers uho in New York and places like that——

Mr. HABUSH. I am from Milwaukee.

Senator HEFLIN [continuing]. Get these $50,000 or $75,000 awards or small country lawyers that get $5,000 or $1,000 verdicts. There is going to be a lot of judge shopping, it seems to me, under this bill the way it is written. I do not think anyone has thought about that. Maybe there is something that ought to be done about it.

Let me ask you about page 11. It seems to me that they are doing pretty well by foreign citizens. Here somewhere this gives foreign citizens the right of choice about where they might want to sue. There is nothing in here that will preempt—here it is on page 12: "Nothing in this act shall be construed to preempt State choice of law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation."

Well, that means that Libya or any other place that comes here and gets injured, has a right to choose its State; and there are a great number of States that in effect go on the tort liability in accordance with the law of France or the law of Libya or something else. They might recover $10 million, whereas a citizen of the United States might not be able to recover more than, say, $100,000.

It seems to me that this law has not been thought through with regard to foreigners and it gives them an exemption. France, for example, as I understand it, has a strict liability, with no limitations. There are a lot of other countries with laws relative to these matters.

Mr. HABUSH. Senator, this bill in my view, at the risk of oversimplification, which is part of a long evolutionary process of product liability attention here in Washington, is a response to the insurance crisis. It is a way to respond to the constituents who are asking for some kind of Federal action and I agree with you that it has not been well thought out, and in particular the joint and several provision in my view and the view of most knowledgeable lawyers, including defense lawyers, would result in plaintiffs having to sue everybody in sight, and defendants not being encouraged and having disincentives to settle. That provision alone is going to result in more trials and less settlements than anything you can imagine, because the defendant in a case who would be, say, 20 or 30 percent negligent, who now is encouraged to settle prior to trial, is going to have no reason to do so and they will roll the dice and see how the jury comes out, and that provision alone is going to proliferate litigation and proliferate the cost of litigation and reduce settlements substantially.

Senator HEFLIN. Well, you have mentioned the matter of increasing litigation. I read here in section 202 that a claimant may not maintain a civil action if any defendant has accepted the claimant's offer of settlement. You have 10 defendants you are suing; one says, well, I am about 2 percent at fault here. I offer to settle my lawsuit for $4,000. The plaintiff would normally say. All right, you have not got much involved in this, let us let you go, there is no point of you going to the expense of all of this litigation and attorney's fees, paying those expensive attorneys about $500. You could not do that under this procedure.

Now, I do not know, but it may mean that if you settle with one defendant on any amount of money, then you cannot maintain suit against the others. I know we have had a lot of issues about antitrust laws. Defendants have settled and got out of lawsuits and everything else, but this forces litigation to costs increase.

Mr. **Habush**. No question about it. No question about it.

Senator **Heflin**. I do not know, but it seems to me that if you have litigation, insurance companies would do just as well to set aside in their reserves moneys for litigation and lawyers' fees and the expenses. A tremendous amount of money should be set aside because if you have to go to a jury verdict, there is no way under this, as I interpret it to negotiate. We used to have what is called a covenant not to sue or a release pro tonto, where you could release one defendant, then whatever you paid him was used as diminution of damages, but you still could go against them.

Mr. **Habush**. If I were a defense lawyer, I would be drooling over this bill.

Senator **Heflin**. Oh, the defense lawyers are getting rich.

Mr. **Habush**. I think it ought to be renamed "The Defense Lawyers Benevolent Act."

Senator **Heflin**. Well, I just keep seeing problems. Here I see another problem. You have a problem—nothing has changed on commercial loss. Well, I see a lawsuit—say we have an explosion, a gas heater explodes in a business where there is a partnership. One of the partners is killed, which is a different approach. Another partner is seriously injured, but the commercial and the contract law is not affected by this exemption, so all of that commercial loss which might be $50 million in a year or $10 million or $200,000, no limitation on that whatsoever as to commercial loss, and then they are limited in various capacities here.

How are you going to try such a lawsuit? Under most States you have joinders of action where you have to join all suits. So here you have a partner who is still living, who has a claim for his personal injury. He has a claim pertaining to his partner who is deceased for a commercial loss, so you have to join all the actions. The judge is going to instruct the jury relative to these matters. It seems to me that you have so much complexity here that again it would be a heyday for defense lawyers. Now, I see so many defects—in capital goods, I see where if a bridge were at fault, a government bridge, it does not belong here. They are not subject to any internal revenue depreciation scale. It is not being held for production. Where is the statute of repose?

A football stadium—this thing just looks to me like it has so many problems with it. There has been an absence of scholarship, shoddy draftsmanship. They ought to refer it to the American law institute or somebody else for some sort of scholarship approach to dot the i's and cross the t's on the bill.

I never have seen such a conglomeration of the way this bill is drafted and written. They say that we are a deliberative body, the U.S. Senate.

Mr. **Habush**. That is because, Senator, as I say, it is a response to the so-called insurance crisis and the proliferation of——

Senator HEFLIN. I do not know whether there is. Maybe there is. But I am not sure that it is a problem now whether the trial lawyers' insurance people and everyone else are guilty of a lot of things. But the product is going to come out of Congress and it deserves to have a reasonable content—something that a judge and a court can follow, something that is not going to have 150 different interpretations of the same language, something which is not going to eliminate all uniformity whatsoever.

Mr. HABUSH. Senator, there are some of crazy lawyers around and some crazy lawsuits around, but this bill just trashes the products liability system and will reduce any incentive for manufacturers of defective products from even being concerned about it, because you are talking about absolute chickenfeed for them, and when you compare it to the kind of disaster that it can befall people who are burned or injured by defective products.

As I said in my testimony, the examples I gave in my opinion and in the opinion of others would never have occurred, those products never would have been withdrawn from the market if this kind of legislation had been in effect 10 years ago.

Senator HEFLIN. Let me give you one more example: We have a section here on drunk driving, saying that it will be a defense if he is 50 percent liable, yet the bill allows for contributory negligence, which says you cannot recover if you are 1 percent liable.

So you have a person driving down the highway drunk, he is 45 percent at fault so he is allowed to recover. A man who was sitting next to him perfectly sober, who may be 1 or 2 percent at fault because he did not give a warning fast enough in regard to running into a Pinto or some other automobile that exploded; yet the drunk, he can recover even if he is 45 or 48 or 49 percent, and under this law you have a person that is 1 percent at fault and he cannot recover.

This thing to me, as I look at it, is just—I think somebody had better go back to the beginning on rewriting the language and trying to figure out what to do on it.

That is all I have.

Senator MCCONNELL. Thank you. Senator Simon.

Senator SIMON. First, I think we all pretty much recognize that we are going through a lot of speeches, you are taking a lot of time to testify, we are not going to pass any bill. This bill as it is now constituted should not pass, but we are not going to pass anything, and I find that frustrating. As I've said before, substantive changes must be made in this area. The executive council of the AFL-CIO has said we should have a bill, but that this one does not make much sense.

In the State of Illinois, in drafting legislation for unemployment compensation and workmen's compensation, we have what we call an agreed bill process, where labor and management get together and they recommend some changes, usually not sweeping changes, but pretty solid changes.

Mr. Habush, you have been good enough to meet with me one evening with Senator McConnell and some others to talk about possible compromises in this area. Does it make sense for the trial lawyers and the insurance industry and business to get together and say, "Let's face it, we do need some changes, we are just spinning our wheels. Let's see if we can't get some small, solid incremental changes that are desirable." That would follow the pattern of the process in Illinois, which has worked for us. I would like to ask that three of you if that makes sense to you.

Mr. HABUSH. Senator Simon, as you say, the three of us were together for dinner and that was the gist of your discussion, and I think that historically the American Trial Lawyers and the Association of Trial Lawyers of America have opposed any Federal legislation on this subject.

We have refused to participate in any drafting or solution to this because we felt so strongly that the common law was the best vehicle for the product liability and because we refused to believe that the premise for the need of change was correct, and we still feel that way, that the premises for this legislation just does not exist. It is just a myth, other than the fact that manufacturers and sellers understandably would like to minimize their exposure and insurance companies would like to cap their payments so they can make more money. I understand that. I would feel the same way about it if I were them.

We in the trial bar and in my administration are evaluating and reevaluating our position on all these questions. I for one do not believe that just because we have taken that position in the past, that that is the position we should be wedded to in the future, and there is a lot of political reality involved in that, in terms of if you do not get involved in the process you may have the process handed to you on a plate, and that is very unpalatable.

At the same time, it is difficult for the trial lawyers as an association or otherwise to get involved in negotiating away the rights of victims. We have no such right to do so. I mean, where do we have the right to enter into negotiations for present and future victims and to do things or make agreements with anybody that affects these people?

If the rhetoric would get lower, if people would stop this bashing of each other, the lawyer bashing and the manufacturer bashing which goes on, and start talking, perhaps there are mechanisms, such as Mr. Scott talked about, which could improve the tort system. I do not know that the Federal solution is the best solution as opposed to a Michigan solution or a Wisconsin solution. But certainly alternate dispute resolution mediation, or even voluntary arbitration, which may keep cases away from lawyers, so what, or maybe cause less legal fees, may be studied.

Maybe there are ways to do that and maybe there are steps that can occur. All I can say to you in response to that is that I have an open mind; my association and my administration is reexamining at the present time our positions. But I can tell you that there are certain sacred cows beyond which there is no negotiation and that is dealing away or negotiating away the rights of injured people without justification. I trust that answers your question.

Mr. SCOTT. If I might add, Senator Simon, I have been involved in tort reform activities in Michigan and we have put together or attempted to put together the kind of committees that you are talking about and unfortunately we have not been able to get any meaningful legislation out because we cannot agree on one basic fundamental and that is that there is a need for the change on it.

Once you get over that hurdle, then you might be able to do something.

But I think what you suggested though is important, and that is that this committee and the draftsmen of any bill ought to get the input of a variety of people. The words "trial lawyer" have been bandied around here this morning as if the only trial lawyers in the world are those that represent the plaintiffs. Well, there are many, many trial lawyers in this country that represent the manufacturers, and I think that they have a lot of very good ideas that would be helpful to this committee.

Senator SIMON. My observation is that sooner or later we are going to get some legislation in this area. My fear is that if the legislation is too sweeping, we may not be able to responsibly forecast the results. I think the trial lawyers and the insurance industry and everyone else would be better off sitting down and trying to find a sensible, balanced middle road, rather than spinning our wheels and getting nowhere as we are now.

One of the next witnesses, Mr. Cheek, represents Crum and Forster Insurance Cos., the second-ranked writers of general liability insurance. One of the things that Mr. Cheek strongly objects to is gathering information at the Federal level. He says our industry is awash in product liability information. It is very interesting. It may be awash in information, but, as a member of the U.S. Senate, I have an awfully difficult time getting solid data on where we were, where we are, and where we are going.

Incidentally, we are the only Western industrialized nation that does not have central government control of insurance. I am not advocating that, but I am suggesting that the central government has the responsibility to see that we have adequate information.

Mr. Cheek says that the insurance business is a State-regulated industry, and thus far has been able to fend off both well-intentioned and maliciously motivated efforts to sweep it into the stifling embrace of Uncle Sam.

My observation is the insurance industry is happy to have Uncle Sam come in to protect it, or to overrule a local ordinance they do not like. But if the Federal Government wants to collect data, that is a horrible thing. Any comments, the three of you?

Senator MCCONNELL. Before the comments, I must join Senator Heflin at the impeachment meeting, which is extremely important; the 2 of us are 2 of the 12 members of that. We are going to continue either with Senator Simon or with Senator Broyhill or with staff, and I apologize for having to depart.

I am sorry, go ahead.

Mr. HABUSH. Senator, I believe that there has been no industry in the history of this country that deserves regulation more than the insurance industry. I just came back from a panel at the National Association of Insurance Commissioners' meeting, in which a full half a day was spent on do we get enough data, and the consensus of people other than the ISO, the Insurance Service Organization for the insurance company, was that when it comes to specific information about specific lines of insurance and with specific information for what amount of dollars change hands and how much is paid for pain and suffering versus economic loss, we do not have that data, and the only way to get that is from closed claim-file examinations.

Congressman LaFalce, back in 1977 and 1978, discovered that during the last products liability crisis, and he discovered some interesting facts, that instead of 1 million products liability claims filed a year, there were 60,000 to 70,000. And instead of half a million average in products liability awards, it was something less than $20,000. So you are not getting enough data and they have the capacity, these insurance companies, to get you the claims data, and it seems to me that if they want to change the civil justice system they have the burden of proof, they should come forth with proof, and you do not get it from the reports that show how much they paid out in claims or how much they reserve. You can only get it from the closed claim files, and it is only going to take a congressional act to get it and congressional overview to replace the inadequate State regulation that is going on.

If you had had adequate State regulation, you would not have had this insurance crisis. They would not have given away their insurance policies in the late seventies and early eighties. They would have controlled the rates. That is my view.

Senator SIMON. I would just add my own observation of State regulation, in the State of Illinois: Sometimes we have had good insurance commissioners and sometimes we have had insurance commissioners who are, frankly, completely under the thumb of the insurance industry. In those cases the regulation has been minimal at best.

Any comments from either of the others?

Mr. SCOTT. No.

Mr. FEW. No, Senator.

Senator SIMON. Then finally one last question. If two people in Washington, DC, who run shoe stores get together and set the price of shoes, we can throw them in prison for 3 years. If two insurance companies get together and set the price of insurance, that is perfectly legal.

What do you think of a modification of the McCarran-Ferguson Act which would allow insurance companies to continue to gather risk information but which would prohibit getting together and setting prices?

Mr. HABUSH. I am in favor of that. I think the recent experience of the insurance crisis of 1986 justifies it. You had an entire industry tripping over each other to give away their commercial policies in the late seventies and early eighties. When one insurance company tried to hold the fort—I think it might have been Hartford—they lost so much business that they had to get into the race.

They have shown that they cannot govern themselves with respect to rate regulation, both up or down, and that agreements among insurance companies with respect to price I think is a dinosaur and that there has to be Federal regulation taking away their exemption from antitrust. I think that more egregious was their total withdrawal from the day-care center industry, with the complete absence of any claim experience. And studies have shown that 97 percent of the day-care centers were not even ever sued, never had a claim against them, and yet they could not get insurance anywhere. Is that not interesting, that no insurance company in America would insure day-care centers?

Now they are starting to get insurance again, they are starting to get back in the market. But they have shown a level of irresponsibility for an industry that has become a central part of American business. That is why there is such a panic in the country. They have made themselves like utilities, like the gas company and the water company and the electric company. They have made themselves essential. Now they have got to own up to that essential aspect of their business, and if they cannot govern themselves then we have to govern them for them, and I suggest that this will not occur in the States, it has to be done here in Washington.

Senator SIMON. Any comments from either of you?

Mr. SCOTT. Senator, I am really not qualified to comment on that aspect of your question and, with all due deference to Mr. Habush, I would suggest that you need some information and background from some people with different areas of expertise than we have to answer that very complicated question.

Mr. FEW. No, Senator, I have no expertise in that area.

Senator SIMON. We thank the three of you very much for your testimony.

Our next panel is Jan Smith, the U.S. Chamber of Commerce, Mr. Leslie Cheek, Crum & Forster Insurance Cos., Mr. R.C. Riley, Independent Insurance Agents of America, and Mr. Jay Angoff, National Insurance Consumers Organization.

Again, we will put the full statements in the record, and if you can summarize that will be helpful.

Mr. Smith.

PANEL CONSISTING OF JAN E. SMITH, U.S. CHAMBER OF COMMERCE; LESLIE CHEEK, VICE PRESIDENT, FEDERAL AFFAIRS, CRUM & FORSTER INSURANCE COS.; R.C. RILEY, ON BEHALF OF INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.; AND JAY ANGOFF, COUNSEL, NATIONAL INSURANCE CONSUMERS ORGANIZATION

Mr. SMITH. Thank you, Senator Simon. I am Jan Smith, president of Jan Smith & Co., of Bradenton, FL. I am an independent businessman and entrepreneur, if you will, with interests in real estate and business investments, equipment leasing, recreational vehicle and mobile home park, a shopping center, appliance sales and service, furniture manufacturing and an independent insurance agency.

I am appearing on behalf of the U.S. Chamber of Commerce today, as a member of the chamber's board of directors and a member of the chamber's Council of Small Business.

I am grateful for the opportunity to testify on the need for product liability reform, a matter of enormous concern to the business community and the public at large.

I feel I am particularly qualified to speak on this issue of product liability reform and the larger issue of overall tort reform, because the businesses that I am a principal in all purchase insurance, and one of them in fact sells insurance, so I am a buyer and a seller of what has become a scarce commodity in some cases and a highly expensive commodity in most cases.

As a businessman and, yes, as a citizen, I know that this country is long overdue for tort reform in general and product liability reform specifically. When I talk to small business people, physicians and small town bankers who are discouraged about the liability and insurance crisis in this country, I tell them that they should not give up hope. The reason is that the situation has gotten so bad that Congress and the various State legislatures are going to have to do something and do it now, because the financial health of our country and its small and big businesses will be severely jeopardized if nothing is done.

It is precisely this outcry for tort reform which prompted the more than 1,800 delegates to last month's White House Conference on Small Business to rank tort reform as the number one policy recommendation. As a delegate to that conference, I fully appreciate how this issue profoundly affects small business.

It is the American small business community who are creating the jobs in this country, whose operations are crippled by protected litigation, and it is the small distributor that is more reluctant to market new products for fear of irrational lawsuits.

The U.S. Chamber is encouraged by the grass roots movement across the country which supports reforming our judicial system. And as evidence of this growing desire to change our judicial system, just last week the National Governors Conference reversed a longstanding position and adopted a resolution calling for Congress to enact a uniform Federal product liability law.

Although the need for civil justice reform transcends the debate over product liability, Federal product liability reform offers the best hope for Congress to address the single component of this complex issue which most clearly calls for Federal solution.

In other words, the message of the White House Conference and the National Governors Conference to Federal and State legislators is clear: Small business urgently needs and wants Federal product liability reform as part of a more general tort reform.

We hope that this committee and the entire Senate will blend the recommendations of the White House Conference with pending legislation.

We concur with the comments made to Chairman Thurmond in an August 15 letter from Assistant Attorney General John R. Bolton. Specifically, the restoration of the role of fault and causation to the tort system is paramount. We applaud the Reagan administration for calling for a fault based system; that is, no liability without responsibility.

The doctrine of joint and several liability, as it has evolved, has been used as a tool to hold unfairly some defendants liable for damages far in excess of their actual responsibility. Going after defendants with the deepest pockets is unfair and inconsistent with the basic principles of fault and accountability. Therefore, the chamber supports legislation to reform the rule of joint and several liability.

We believe that developments in the legal system for compensating injury have contributed significantly to the sharply increasing problems related to availability and affordability of liability insurance.

Tort and civil justice reforms are critical to the solution of the crisis that product manufacturers and sellers face in obtaining and affording liability insurance. Indeed, insurance affordability and availability are linked directly to the problems which businesses face in the tort system.

But even if liability insurance were somehow made available to all who wanted it, problems arising from excessive product liability suits would remain. Specifically, corporate bankruptcies resulting from unending litigation would continue, product prices would continue to increase to reflect higher litigation costs, and new products would be withdrawn from the market by businesses under the threat of suits. Only when logic and fairness are incorporated into the civil justice system will these problems begin to correct themselves.

The chamber urges this committee to correct present inequities in the tort system and to begin by enacting Federal product liability reform. We hope that Congress will respond to the message sent from the White House Conference on Small Business and the National Governors Conference and that Congress will enact a Federal product liability law this year.

In conclusion, I wish to submit my full statement for the record. I also will submit the No. 1 recommendation of the White House Conference on Small Business regarding tort reform. Of the different issues we talked about here last month—and many of them are insidious, such as the drug problem—the No. 1 issue voted out by the small business people and entrepreneurs of America, 1,800 strong assembled here, is the liability insurance crisis. It is in fact a very, very serious national problem.

Thank you.

[The prepared statement of Mr. Smith follows:]

STATEMENT
on
THE PRODUCT LIABILITY REFORM ACT (S. 2760)
before the
SENATE COMMITTEE ON THE JUDICIARY
for the
U.S. CHAMBER OF COMMERCE
by
Jan Ellis Smith
September 10, 1986

I am Jan Ellis Smith, President of Jan Smith and Company of Bradenton, Florida. I am appearing on behalf of the U.S. Chamber of Commerce, the world's largest federation of companies, chambers of commerce, and trade and professional associations. As a member of the Chamber's Board of Directors and a member of the Chamber's Council of Small Business, I am grateful for the opportunity to testify on the need for federal product liability reform, a matter of enormous concern to the business community and the public at large.

The Chamber strongly supports federal product liability reform--a reform that is critical to the vitality of American business. For over a decade, the business community has sought to bring uniformity, predictability, and fairness into our product liability laws. Our plea is louder today because the need for a uniform federal product liability law is more urgent than ever. While we are pleased that this committee is holding hearings on product liability, we are disappointed by the failure of Congress to have passed a federal product liability reform law. We reemphasize our desire to see Congress pass a product liability reform bill this year.

Today, product liability reform is at the "cutting edge" of a widespread and growing public movement favoring overall tort reform. It is precisely this outcry for tort reform that prompted the more than 1800 delegates to last month's "White House Conference on Small Business" to rank tort reform as their number one policy recommendation, and federal product liability reform as number nine.

As a delegate to that conference, I fully appreciate how this issue profoundly affects small business. The delegates to the Conference were not large corporations but representatives of small businesses of every type. Those who still contend that this is a "big business" issue ignore reality. It is the American small business community whose operations are crippled by protracted litigation. It is the small manufacturer who finds it increasingly difficult to compete with foreign companies, which are not subject to the threat of product liability suits. And it is the small distributor who is more reluctant to market new products for fear of irrational lawsuits, which they cannot afford to litigate.

The Chamber is encouraged by the grass-roots movement across the country that supports reforming our judicial system. Through information submitted to the "U.S. Chamber's National Clearinghouse on the Liability Crisis," we have learned that over half the states have strong and growing coalitions working for reform of our judicial system. As evidence of this growing desire to change our judicial system, just last week the National Governors' Conference reversed a long-standing position and adopted a resolution calling for Congress to enact a uniform federal product liability law.

The need for a federal product liability law reflects a broader concern about the need to reexamine our entire judicial system. In recent years, there has been an explosion of litigation in the United States, especially tort litigation, that threatens the fundamental judicial objectives of deterrence and redress. Courts consistently have redefined substantive and procedural law to permit easier recovery of larger and larger amounts of damages, which often have little relationship to the economic loss suffered. This has created inconsistent and often contradictory state laws. In such an environment, the predictability that is required for profitable business operations and rational insurance rate-setting has vanished.

Although the need for civil justice reform transcends the debate over product liability, federal product liability reform offers the best hope for Congress to address the single component of this complex issue that most clearly calls for a federal solution. In other words, the message of the White House

Conference and the National Governors' Conference to federal and state legislators is clear: small business urgently needs and wants federal product liability reform as part of more general tort reform.

S. 2760, the "Product Liability Reform Act," which was reported recently by the Senate Committee on Commerce, Science, and Transportation, has serious inadequacies. It does not follow the suggested action of the White House Conference delegates who recommended comprehensive civil justice reform and federal standards for product liability. We hope that this committee and the entire Senate will blend the recommendations of the White House Conference with pending legislation.

We concur with the comments made to Chairman Thurmond in an August 15th letter from Assistant Attorney General John R. Bolton. Specifically, the restoration of the role of fault and causation to the tort system is paramount. Those who are responsible for injuring others should offset, to the extent of that responsibility, the harm that they have caused. If each individual is held responsible only for his actions, the goal of seeking redress from identifiable wrongdoers is served better. We applaud the Reagan Administration for calling for a fault-based system, i.e., no liability without responsibility.

Moreover, this legislation does not remedy adequately a second major problem in our tort system--the manner in which damages are apportioned among defendants. The doctrine of joint and several liability, as it has evolved, has been used as a tool to hold unfairly some defendants liable for damages far in excess of their actual responsibility. This rule, when first adopted, had very limited consequences because it applied only when defendants acted in concert. More recently, the doctrine has been expanded to require that any defendant may be responsible for all damages resulting from an injury. This means that the law allows full recovery from a defendant whose fault was comparatively slight. Pursuing defendants with the deepest pockets is unfair and inconsistent with the basic principles of fault and accountability. Therefore, the Chamber supports legislation to reform the rule of joint and several liability (as it applies to both noneconomic and economic damages) to remove this unfair element from our product liability laws.

In addition to addressing inadequately the issues of fault and the doctrine of joint and several liability, S. 2760 contains so-called "settlement incentives," which are likely to increase total litigation transaction costs. As the Department of Justice accurately stated in its August 15th letter, "(t)he result in many instances would be never ending litigation as the parties attempt to reopen settlements to reflect changing circumstances. In the absence of finality [in litigating claims], litigation would be more protracted, expensive and burdensome." We agree. Therefore, the Chamber supports the elimination of open-ended and untested settlement incentives.

We believe that developments in the legal system for compensating injury have contributed significantly to the sharply increasing problems related to the availability and affordability of liability insurance. Tort and civil justice reforms are critical to the solution of the crisis that product manufacturers and sellers face in obtaining and affording liability insurance. The often-cited product liability "horror" stories, in which plaintiffs recover enormous sums based on jury sympathy or doctrines of deep pockets and strict liability, lead us to ask if it is any wonder that insurers are unwilling to offer coverage for activities for which they cannot predict the risk.

Indeed, insurance affordability and availability are linked directly to the problems that businesses face in the tort system. But, even if liability insurance somehow were made available to all who wanted it, problems arising from excessive product liability suits would remain. Specifically, corporate bankruptcies resulting from unending litigation would continue; product prices would continue to increase to reflect higher litigation costs; and new products would be withdrawn from the market by businesses under the threat of suits. Only when logic and fairness are incorporated into the civil justice system will these problems begin to correct themselves.

The Chamber first endorsed a federal product liability law almost five years ago. Its support was based on fears of excessive litigation clogging the courts, of useful products being withdrawn from the marketplace, and of escalating insurance costs. These fears have been realized, and they cast a shadow over the future well-being of American business.

The Chamber urges this committee to correct present inequities in the tort system and to begin by enacting federal product liability reform that takes into consideration the concerns that we have stated. We hope that Congress will respond to the message sent from the White House Conference on Small Business and the National Governors' Conference and enact a federal product liability law this year.

Senator SIMON. Thank you.

Mr. Cheek.

OPENING STATEMENT OF LESLIE CHEEK

Mr. CHEEK. Thank you, Senator Simon. You raised a number of interesting points in your discussion with the preceding witnesses, and, rather than reading a truncated version of my prepared remarks, I wonder if I could just put it in the record and respond to some of the things you said.

Let us first focus on the data question. When I said in my statement that we are awash in product liability data, I think that that is quite demonstrable and, if I might, I would like to put in the record some pieces of the data that are available to us, most of which have already been provided to your staff:

A 10-year retrospective on product liability; for both bodily injury and property damage liability; a memorandum that I sent to your staff which enclosed our annual statement and the product liability supplement thereto, which can tell you about as much as you would want to know on a State-by-State basis, and probably more; and the annual statement itself.

Also I think it would be helpful to put in the record the kinds of data that we have provided on other classes of liability insurance in which there have been availability and affordability problems.

Senator SIMON. If I may ask you, in your company do you list your securities on the basis of market price or purchase price?

Mr. CHEEK. It varies. I think the——

Senator SIMON. I am talking about your particular company.

Mr. CHEEK. We are required by the NAIC rules to list the values of those securities in a specific way. Stocks are at market, bonds are at amortized value.

Senator SIMON. But you are aware that there is no uniformity in your industry on how that is listed?

Mr. CHEEK. No, sir, there is uniformity. There are specific rules as to the way we are required to report on certain categories of assets.

Senator SIMON. Well, I would suggest that you check that out a little more carefully.

Mr. CHEEK. It is true. I know that because this issue has come up before.

Senator SIMON. Well, if you will check carefully you will see that there is no uniformity in this area.

Mr. CHEEK. Well, I think the annual statement blank is——

Senator SIMON. Maybe in your company there is uniformity, but there is not——

Mr. CHEEK. We are all required to use the same blank, Senator, every company in the country, 3,500 property-casualty companies are all required to use the same blank.

Senator SIMON. I suggest you check the facts.

Mr. CHEEK. Very good.

Let me turn now to the question that you raised about two insurers sitting down to fix prices. Somehow we are alleged to be immune from the antitrust laws if we do that. First of all, we do not do that. The only collective action that is involved is the col tion of data by the statistical organizations licensed by the States to do that. The prices that we charge are based on advisory rates based on the data assembled by the statistical agents.

Senator SPECTER. May I interrupt for just 1 minute?

Mr. CHEEK. Certainly.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. I regret that I cannot stay because of other commitments. I want to thank you all for coming. I am represented here by staff and I just want the record to show that I am submitting certain questions for the record. Please pardon the interruption.

Mr. CHEEK. Certainly, Senator.

Senator SPECTER. Thank you.

[The prepared questions of Senator Specter follow:]

QUESTIONS SUBMITTED BY SENATOR ARLEN SPECTER, SEPTEMBER 9, 1986

For the Honorable Richard K. Willard:

1. In reviewing S. 2760, I noted that Section 308 provides for the abolishment of joint and several liability for only non-economic damages, such as pain and suffering. In many states, including Pennsylvania, reforms addressing the issue of joint and several liability have been addressed by the state legislatures. What would be the effect of this provision, in conjunction with the preemption provision contained in section 103(b) of the bill, on the many states which have previously addressed this issue?

2. There have been several schools of thought with respect to the cause of the liability insurance crisis and the unavailability and unaffordability of liability insurance. Some opponents of tort law reform have suggested alternatives for dealing with the insurance industry's cycles as a way of addressing the issue, which includes elimination or cut back of the antitrust exemption which is given to the insurance industry under the McCarran-Ferguson Act, and/or establishing new federal insurance programs for industries hardest hit by the crisis. What is the Department's position on these alternative suggestions?

For John B. Curcio, National Association of Manufacturers:

3. Section 201 of the bill provides for an expedited settlement procedure and payment of $100,000 penalty by the defendants if they do not prevail in court after refusing to settle. What is your opinion with respect to this amount as a penalty, particularly when the bill provides for a $100,000 limit on dignitary losses, such as serious and permanent disfigurement, or loss of limb or organ?

For John E. Scott, ATLA:

4. One of the reasons offered for the need for federal tort reform is that the legal fees paid to plaintiff's attorneys are too high. Yet, in most product liability cases, the lawyer accepts the case on a contingency fee basis. How do you account for this discrepancy?

[Responses not available at press time.]

Mr. CHEEK. In product liability, Senator, we probably have the biggest need for this kind of collective information because product liability is divided into some 400 rating categories representing different kinds of products. Moreover, product liability is written by about 1,300 different insurance companies in the 50 States.

We do not get enough data in each of those pigeonholes for an individual company to be able by itself to decide what the right price is for a widget or a clothespin or a machine tool, therefore we do have to work together to come up with enough data to make the prices.

Senator SIMON. Then, if I may ask, I gather you are in support of my bill because my bill would permit you to continue to gather information but not to get together and set prices.

Mr. **Cheek**. We do not do that. All of our ratemaking data is advisory only.

Senator **Simon**. I understand.

Mr. **Cheek**. There is no requirement in ISO membership that you use ISO rates.

Senator **Simon**. If we simply prohibit insurance companies from getting together to set prices, why do you object to that?

Mr. **Cheek**. I do not think we do. In other words, I think if you——

Senator **Simon**. I am glad to hear that.

Mr. **Cheek**. If you look at the experience of your own State of Illinois, there has not been a rating law for anything but workers' compensation in that State since 1971, and we have had to change nothing in the way we do business, even though we are exposed to the full force and effect of both State and Federal antitrust law in Illinois and have been since 1971. But there are aspects of your bill that we are perfectly comfortable with, no question about that.

Let me now turn to the issue about day care centers. The day care center market was written largely by a number of specialty carriers, for example, the Mission Insurance Co. of California. They got in deep trouble because they were underpricing that business at a time when losses were accelerating. As a result, the Mission and others simply bailed out of that business and dumped all of those day care centers on the market at a time when everybody else's capacity was very severely limited. That was a phenomenon: not of some kind of collusive or collective action, but the dumping of a whole book of business onto a market that had no experience with it, and at that time had no capacity to pick up that business.

What we have tried to do as we have improved our profitability and recovered is to try and make markets for the risks that were victims of that sudden collapse of the market. We have worked together to provide coverage for the nurse midwives. There is a program now underwritten by the Continental to provide coverage for day care centers. We are trying to come back into the markets where there are still insurable risks, and I think as profitability improves so will capacity and availability.

That is all I have, Senator.

[The prepared statement of Mr. Cheek and information referred to follow:]

Testimony of
Leslie Cheek, III
Vice President-Federal Affairs
Crum & Forster Insurance Companies
before the
Committee on the Judiciary
United States Senate
concerning
S. 2760, the Product Liability Reform Act

Washington, D. C.
September 10, 1986

Mr. Chairman and Members of the Committee:

The Crum & Forster Insurance Companies that I represent are the Nation's second-ranked writers of general liability insurance, which typically includes the products and completed operations coverage that would be affected by the bill before you. We thus have a significant economic stake in the enactment of meaningful reform of product liability law.

In our view, the measure reported from the Committee on Commerce, Science and Transportation in June is a classic of the "good news-bad news" genre, providing some helpful tort reform but also incorporating some highly distasteful data reporting requirements and omitting most of the legal changes needed to restore predictability to the insurance of product liability risk.

The good news in the bill includes provisions which would narrow the range of decisional discretion under current law and help reduce the huge transaction costs associated with settling and litigating product liability claims.

The bill's limitations on the applicability of the rule of joint and several liability would provide some assurance to insurers that their policyholders will not be held liable for non-economic loss inflicted by other parties with shallower pockets; and the bill's statutes of repose and limitation would end the current uncertainty over the number of years that must pass before insurers' product liability books may be closed on particular products.

Similarly, the bill's provisions for dealing innocent product sellers out of product liability suits and for integrating product liability with workers' compensation would provide significant savings in transaction costs for insurers and self-insurers alike.

But that's all the good news there is in the bill; its potentially helpful settlement incentives are seriously flawed.

We believe that the predictability of the product liability system would be better served, and its costs reduced more, by a settlement incentive system in which dignitary loss always varied with the amount of net economic loss involved. Moreover, a multiplicative approach to dignitary loss would prevent the overcompensation of small cases and the undercompensation of serious injuries that a "cap" approach guarantees.

With the $250,000 "cap" currently in the bill, a claimant with $10,000 in net economic loss and a minor but "permanent impairment of a bodily function" can seek up to 25 times the amount of his net economic loss in "dignitary loss," while a severely burned claimant facing multiple skin graft operations and $1,000,000 in uncompensated medical bills would be limited to one-quarter of this amount in "dignitary loss" if the defendant had tendered a settlement ofer.

If "dignitary loss" were calculated at, say, twice a claimant's net economic loss, the $10,000 claimant could recover no more than $30,000 (as opposed to a possible $260,000) but the $1,000,000 claimant could be awarded up to $3,000,000 (as opposed to a maximum of $1,250,000 under the current bill).

We also think that it would be worthwhile to explore a schedule approach to "dignitary loss" for those serious product-related physical injuries which do not result in net economic loss. For example, loss of the physical ability to bear children could be subject to a one-time award of a specified amount.

Now, the bad news.

The most egregious omissions from the bill, in our judgment, are (1) provisions giving product manufacturers defenses to product liability based on the state of the art at the time these products were manufactured and on consumer alteration and misuse of their products; and (2) extension of the limitations on the joint and several liability doctrine to economic as well as non-economic loss.

If there is to be a product liability insurance market for manufacturers whose products pose any risk of being found harmful in the future, limits must be placed on the ability of courts to impose strict liability retroactively on persons whose conduct was not tortious when it occurred.

Similarly, the courts must be precluded from imposing product liability where there is no defect in the product or its design or hazard warnings; where the product has caused no present harm; or where the consumer altered or misused the product.

Some examples from recent case law will illustrate why insurers feel so strongly about these issues.

(1) Retroactive Liability for Unknown Risks.

During the past four years, four State courts have ruled that a product manufacturer may be held retroactively liable for defects in its products that it did not know of, and could not scientifically have discovered, at the time it made those products.1/

These holdings have, among other things, propelled the insurance industry into the use of "claims-made" policy forms for any business whose products pose any risk of being found hazardous in the future (e.g., pharmaceuticals, chemicals). Pricing an "occurrence"-based policy form now for risks for whom new scientific findings can be given retroactive legal effects would be a form of economic suicide in today's judicial climate.

New Jersey was the first State to enforce this 20-20 hindsight rule, in a 1982 case involving asbestos.[2/] In 1984, Massachusetts[3/] and Arizona[4/] applied it to a snowplow and a machine tool, respectively. And this year, it was used in Louisiana,[5/] whose Supreme Court ruled as follows:

> The fact that a risk or hazard related to the use of a product was not discoverable under existing technology or that benefits appeared greater than they actually were are both irrelevant.

How can insurers price today for this kind of liability tomorrow?

(2) Liability Without Defect.

While Congress, in Superfund, pioneered the notion that liability could be imposed without a showing that a defendant's conduct caused harm, Maryland became, in 1985, the first State to impose product liability on a manufacturer whose product was in no way defective. The maker of a "Saturday Night Special" handgun was found liable for the shooting of a person during a grocery store robbery, not because there was a defect in the gun, but rather because the court, in an unusual bit of social engineering, felt the manufacturer "knew it could be used in criminal activity."[6/]

Happily, the Maryland legislature this year overruled this case, but who knows whether the logic of this decision will be adopted in another State? Will liquor manufacturers be held liable for someone's alcoholism? Will confectioners be found responsible for their customers' tooth decay?

What are insurers to do when cases like this come along? Even with a claims-made policy form, in which the coverage is for claims submitted during the policy year, how is an insurer to price the state of the law when those claims are tried or settled several years down the road? And what should be done about reserves under past policies?

(3) Liability Without Injury.

The Fifth Circuit Court of Appeals, allegedly interpreting Mississippi law, recently permitted an asbestotic shipyard worker to recover tort damages for a greater than 50 percent medical probability that he will develop cancer sometime in the future.[7]

Tort law has traditionally required a showing of actual harm as a predicate for recovery of damages, on the common-sense theory that speculative damages are entirely subjective. Liability insurance contracts have reflected the law, providing coverage for "bodily injury" or "property damage" to third parties arising out of insureds' activities.

How are insurers to price exposure for the "probability" of bodily injury? Should they assume that everyone exposed to a hazardous substance associated with long-latency disease will make a claim for the probability that they will contract it? And if "medical probability" of future injury is actionable, can fear of future harm be far behind? Where does logic of this nature lead us, and how do we measure its economic consequences?

Notice that in the first category of cases, the innocent pay. In the second example, liability was imposed in the absence of a product defect. In the third, there was no present injury. One wonders whether in the absence of reform a court will someday combine these exotica and award tort damages when there has been no showing of either fault, defect or injury.

Equally egregious, in our eyes, is the bill's failure to provide protection from perversions of the joint and several liability rule with respect to economic loss in cases in which defendants can show that there was no conscious agreement to participate in conduct that was likely to be harmful to plaintiffs.

Insurers cannot measure or price the kind of vicarious liability that would be permitted under State law without further limitations on the "deep pocket" rule currently in force in more than 30 States.

These omissions from the bill would be fully addressed by the pending Kasten-Lugar-Kassebaum and Pressler amendments, and we vigorously endorse these proposals.

The bad news also includes provisions that would require product liability insurers, self-insurers and captive insurers to report to the Secretary of Commerce "all data deemed necessary by the Secretary to fully present and analyze the impact of the [Product Liability Reform] Act on such insurers."

Worse, the Secretary is given the authority to "specify the information to be provided by such insurers and the format of such information."

Notwithstanding Committee report language potentially softening their impact, our problems with these provisions are manifold.

First, our industry is awash in product liability information, compiled by classification and subclassification, by State, and by individual company and industry-wide aggregates; and both we, our State regulators, and State-licensed statistical agents have not only already furnished it to anyone who has asked for it, but have repeatedly stated our willingness to supply it on a continuing basis without Congressional compulsion. We thus can see no utility in forcing the taxpayers to pay Federal bean-counters to compile data that is already available from private sources.

Second, these provisions would empower a single Federal bureaucrat to compel the casualty insurance industry to rewrite its data-collection programs to gather any data he or she "deems necessary," whether or not it is of any utility to insurers or their regulators. Thus, the purchasers of product liability insurance would be required to subsidize the cost of satisfying the Federal Government's curiosity about such arcana as whether a product liability claim was paid out as a settlement or as a result of a court judgment, and the distribution of damages between economic and non-economic losses in product liability claims.

Third, the insurance business is a State-regulated industry, thank God, and has thus far been able to fend off both well-intentioned and maliciously-motivated efforts to sweep it into the stifling embrace of Uncle Sam. It takes no genius to see that insurance data reporting requirements are the first step down a one-way road to Federal insurance regulation. We view with horror the prospect of Ralph Nader telling the Congress how we should classify and price our business, and the possibility that we will be subject to an analogue of the Federal solvency protection mechanism that gave America the collapse of the Continental Illinois Bank.

Fourth, we wonder what the data we would be compelled to produce would prove that we do not already know, and have already told everybody that will listen to us. The data tell us only where the law and its associated costs have been, not where they are going. No sane underwriter today would base a judgment to insure, and no sober actuary would establish a price for, a product liability risk solely on what he or she can see in the rear-view mirror.

The fact of the matter, as the cases I cited earlier illustrate, is that past insurance loss and expense data in many product liability classes are virtually useless as predictors of future insurance prices. All the product liability data currently available can provide nothing more than indicia of a legal system beyond predictability -- exponential growth in losses and associated transaction costs in certain product classifications; wildly inconsistent awards and settlements growing out of essentially identical fact patterns; and sharply escalating premiums.

None of these data will answer the really important question: Why has product liability become so unpredictable? The answer to this question, of course, lies in the case law, the "real life" examples of judicial excess that the enemies of meaningful reform dismiss as mere "anecdotes." The bad cases cast long shadows over the product liability underwriting, pricing and claims settlement processes, shadows that no amount of retrospective data can remove.

Finally, we know from long and bitter experience that insurance data reporting requirements are the last defense of the organized plaintiffs' bar to meaningful reform. The no-fault automobile insurance, product liability, and general tort reform statutes of many States are already littered with cumbersome, expensive, and ultimately useless reporting requirements that are monuments to the legal fraternity's efforts to focus legislators on the messenger, rather than on the message.

We hope, of course, that every effort can be made to remove the data reporting provisions from the bill, since they serve only to divert attention from its important substantive goals, and to undercut its potential cost savings.

In conclusion, Mr. Chairman, we believe that S. 2760 is a meaningful first step toward significant reform of product liability law. But if predictability and stability are to be restored to product liability insurance markets, the bill must be strengthened through addition of the Kasten-Lugar-Kassebaum and Pressler amendments and deletion of the data reporting requirements.

We appreciate this opportunity to present our views. We would be pleased to answer any questions you might have.

Footnotes

1/ *See Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982); *Elmore v. Owens-Illinois, Inc.*, 637 S.W.2d 434 (Mo. 1984); *Hayes v. Ariens Co.*, 391 Mass. 407, 462 N.E.2d 273 (1984); *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876 (Ariz. 1985); *Halphen v. Johns-Manville Sales Corp.*, ___ So.2d___ (No. 85-CQ-0455, La. 1986).

2/ *See Beshada*, *supra*, 447 A.2d 539. A later New Jersey decision *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984), limited the scope of *Beshada* to asbestos.

3/ *See Hayes*, *supra* 462 N.E. 2d 273.

4/ *See Dart*, *supra*, 709 P.2d 876.

5/ *See Halphen*, *supra*, ___So. 2d___ (La. 1986).

6/ *Kelley v. R.G. Industries, Inc.*, 497 A2d 1143 (Md. App. 1985).

7/ *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986).

Crum & Forster
Insurance Companies

1025 Connecticut Avenue, N.W.
Suite 414
Washington, D.C. 20036
(202) 296-5850

Leslie Cheek
Vice President
Federal Affairs

July 11, 1986

To: Persons Interested in Products Liability Insurance
Data Reporting Requirements

From: Les Cheek

Re: NAIC Annual Statement and its Products Liability
Insurance Supplement

Enclosed are copies of the 1985 Consolidated Annual Statement of the Crum & Forster Insurance Companies and of the Products Liability Insurance Supplements thereto filed on behalf of the five Crum & Forster insurers which write products liability insurance. I thought these documents might be of interest to you in light of the argument that insurers either don't have or won't share data on their product liability insurance business.

The Crum & Forster Insurance Companies are the Nation's second-largest writers of general liability insurance, referred to in the Annual Statement as "other liability." The general liability line typically includes the products liability exposure. In 1985, our companies wrote $544,230,850 in general liability business, approximately $75,974,868 of which was attributable to products liability.

Neither we nor our State regulators regard the data in the Supplements as credible for either rate making or solvency measurement purposes; the Supplement was adopted by the National Association of Insurance Commissioners in 1978 only to satisfy the data reporting requirements imposed on insurers in the product liability reform laws of some 18 jurisdictions.

The reasons for the uselessness of State-by-State product liability data are endemic to the nature of product liability, which can arise out of a product sold by a manufacturer headquartered in one State, made at a plant in another State, distributed from a third, sold to a consumer in a fourth, and perhaps causing injury to the resident of a fifth.

Under these circumstances, the assignment of product liability premium losses and expenses to a particular State is at best arbitrary. At Crum & Forster, we code product liability data on the basis of the State in which the product is made, whether or not that State is one in which the product involved was either sold, bought, or implicated in an injury. Thus, State-by-State product liability financial data are inherently unreliable on major issues of interest to individual States.

The unreliability of State-by-State product liability financial data is not relieved by the coding of product liability statistical data in company reports to the Insurance Services Office, Inc. (ISO), the industry's principal statistical and rate advisory organization. ISO does not keep State-by-State product liability records from the 1,300 companies that report their experience, since, for reasons explained below, product liability insurance rates are based on countrywide loss and expense experience.

Companies report their experience to ISO according to the approximately 400 (out of 900) classifications in ISO's Commercial Statistical Plan (CSP) that involve manufactured products. This very thin slicing of what, even to Crum & Forster, is a fairly small pie to begin with, gives rise to the problem that forces ISO to use countrywide, rather than State-by-State, data in its rate advisory process.

The problem is one of data sparseness -- that is, insufficient numbers of premium, loss and expense dollars in a particular classification of product liability insurance to be reliable (or credible) for purposes of determining an appropriate premium for the members of that particular universe of risks.

Another aspect of this problem is the "long-tail" nature of the product liability peril. You will notice in the enclosed Supplements that in the year in which the premium was written (page 1, column 2), very few dollars of losses were paid (page 1, column 5), while many more dollars of loss have been assigned to claims known to us but not yet paid (page 1, column 6), and still more dollars of loss have been assigned to claims that have not yet been reported to us, but which we know, on the basis of historical experience, will materialize in the years to come (page 1, column 7).

To deal with this "long-tail" phenomenon, ISO insists on using a five-year retrospective period for purposes of estimating future rates, not only to accumulate sufficient numbers of premium, loss and expense dollars in each product classification, but also to test the sufficiency of prices over time to cover slow-developing losses and expenses.

To better appreciate this "long-tail" phenomenon, take a look at the "Other Liability" schedule (Schedule P - Part 1B) on page 28 of the enclosed Annual Statement. Notice that in recent years, the ratio of earned premiums (column 2) to actual loss payments (column 3) makes us look like thieves. Then compare column 2 with columns 9, 10, and 11, for all the years involved, and you will see that it takes a very long time to know whether or not the premium earned (column 2) was sufficient to cover total losses and loss expense incurred in accidents that took place during that policy year (column 11).

For example, we still have yet to settle 381 claims, involving more than $12 million in losses and $2.3 million in legal fees (columns 8, 9, and 10), that arose out of occurrences that took place in 1976 -- nearly 11 years ago.

You will also notice, in columns 2, 11 and 12 of the schedule, a fairly vivid illustration of the effects of the industry price war of 1980-1983. Notice that our earned premiums (column 2) declined from $289,312,924 in 1979 to $228,557,605 in 1983, while incurred losses and expenses (column 11) shot up from $145,972,516 in 1979 to $253,026,547 in 1983. Notice, too, the steady deterioration of the ratio of incurred loss and loss expense to earned premium (column 12) during this period.

Finally, the Schedule provides a very illuminating justification for product liability reform. Notice, in the years 1984 and 1985, the stupendous increases in earned premium (column 2) over the preceding years. But, more ominously, notice that incurred losses and loss expense (column 11) more than doubled in the same short period, resulting in a steady worsening of the loss and loss expense ratio (column 12). Even with every effort to price our general liability product in accordance with the risk exposure, we seriously misjudged the extent of the explosion in tort losses and transaction costs.

#

CONSOLIDATED
ANNUAL STATEMENT

CRUM & FORSTER
INSURANCE COMPANIES

PRINCIPAL INSURER:

UNITED STATES FIRE INSURANCE COMPANY

AND ITS AFFILIATED FIRE AND CASUALTY INSURERS:

THE NORTH RIVER INSURANCE COMPANY
WESTCHESTER FIRE INSURANCE COMPANY
INTERNATIONAL INSURANCE COMPANY
INDUSTRIAL INDEMNITY COMPANY
INDUSTRIAL INDEMNITY COMPANY OF ALASKA
INDUSTRIAL INDEMNITY COMPANY OF THE NORTHWEST
INDUSTRIAL INSURANCE COMPANY
INDUSTRIAL INSURANCE COMPANY OF HAWAII, LTD.
INDUSTRIAL UNDERWRITERS INSURANCE COMPANY
INDUSTRIAL INDEMNITY COMPANY OF IDAHO
ALL WEST INSURANCE COMPANY
CALIFORNIA INSURANCE COMPANY
INTERNATIONAL SURPLUS LINES INSURANCE COMPANY
CONSTITUTION REINSURANCE CORPORATION
AMERICAN EAGLE INSURANCE COMPANY
CRUM AND FORSTER INSURANCE COMPANY
CRUM & FORSTER UNDERWRITERS CO. OF OHIO
VIKING INSURANCE COMPANY OF WISCONSIN
NATIONAL GENERAL INSURANCE COMPANY
NATIONAL GENERAL ASSURANCE COMPANY
MT. AIRY INSURANCE COMPANY
LWB SYNDICATE INC.
STAR INSURANCE COMPANY
PREMIER INSURANCE COMPANY

Insurance Department

OF THE

STATE OF

FOR THE YEAR ENDED
DECEMBER 31, 1985

FIRE AND CASUALTY

FIRE AND CASUALTY COMPANIES—ASSOCIATION EDITION

Note: In the case of reciprocal exchanges and other types of insurers using special terminology, the printed items and references in this blank, if not appropriately changed, shall be considered to apply to such insurers in respect to corresponding data and information as the context may require.

ANNUAL STATEMENT

For the Year Ended December 31, 1985

OF THE CONDITION AND AFFAIRS OF THE

CRUM & FORSTER INSURANCE COMPANIES

PRINCIPAL INSURER: UNITED STATES FIRE INSURANCE COMPANY

Affiliated Insurers

The North River Insurance Company
Westchester Fire Insurance Company
International Insurance Company
Industrial Indemnity Company
Industrial Indemnity Company of Alaska
Industrial Indemnity Company of the Northwest
Industrial Insurance Company of Hawaii, Ltd.
Industrial Underwriters Insurance Company
Industrial Indemnity Company of Idaho
Industrial Insurance Company
All West Insurance Company
Califirmia Insurance Company
International Surplus Lines Insurance Company
Constitution Reinsurance Corporation
American Eagle Insurance Company
Crum and Forster Insurance Company
Crum & Forster Underwriters Co. of Ohio
Viking Insurance Company of Wisconsin
National General Insurance Company
National General Assurance Company
Mt. Airy Insurance Company
LWB Syndicate Inc.
Star Insurance Company
Premier Insurance Company

Organized under the Laws of the State of New York, made to the

INSURANCE DEPARTMENT OF THE STATE OF

PURSUANT TO THE LAWS THEREOF

Incorporated APRIL 1, 1836 Commenced Business APRIL 9, 1836

Home Office 110 WILLIAM STREET (Street and Number), NEW YORK, NEW YORK 10038 (City or Town, State and Zip Code)

Mail Address CN 1933 (Street and Number), MORRISTOWN, NEW JERSEY 07960 (City or Town, State and Zip Code)

ain Administrative Office 201 (Area Code) 285-7000 (Telephone Number)

ntact Person and Phone Number HENRY J. OLIN (201) 285-7443

OFFICERS

Chairman of the Board, President and Chief Executive Officer	Joe Lee Stinnette
Vice Chairman of the Board	Sidney Frederick Wentz
Executive Vice President	Larry Dean Carr
Executive Vice President	Thaddeus Stanley Woods
Senior Vice President and Treasurer	George Joseph Bachmiel #
Senior Vice President and General Counsel	Albert Cunningham Moore
Senior Vice Presidents	William Andrew Bowers # Harold Clark Jackson #
Vice President, Secretary and Counsel	Antoinette Cobell Bentley
Vice President and Counsel	Thomas Warnke #
Assistant Vice President	Jeffrey Paul Reiber #

DIRECTORS OR TRUSTEES

Larry Dean Carr
Peter Ottley Crisp
James John Cutro
Reginald Kehnroth Groome
Frances Richards Hesselbein
Melvin Howard #
Lawrence Smith Huntington
John Joseph McGinty #
Crocker Nevin
William Combs Ridgway III
Bobby Price Russell
Joe Lee Stinnette
Sidney Frederick Wentz

ate of NEW JERSEY
unty of MORRIS } ss GEORGE J. BACHMIEL, SENIOR VICE PRESIDENT AND TREASURER AND JEFFREY J. REIBER, ASSISTANT VICE PRESIDENT

he UNITED STATES FIRE INSURANCE COMPANY being duly sworn, each for himself deposes and says that they are the above described officers of the said insurer, and that on ty-first day of December last, all of the herein described assets were the absolute property of the said insurer, free and clear from any liens or claims thereon, except as herein stated, and that this annual statement, together with related exhibits, schedules explanations therein contained, annexed or referred to are a full and true statement of all the assets and liabilities and of the condition and affairs of the said insurer as of the thirty-first day of December last, and of its income and deductions therefrom for ear ended on that date, according to the best of their information, knowledge and belief, respectively.

Subscribed and sworn to before me this

day of MARCH 1986

SENIOR VICE PRESIDENT AND TREASURER

ASSISTANT VICE PRESIDENT

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

ASSETS	1 Current Year	2 Previous Year
1 Bonds	$ 3,123,010,981	$ 2,699,905,930
2 Stocks:		
2.1 Preferred stocks	90,973,949	120,169,836
2.2 Common stocks	646,536,373	580,978,330
3 Mortgage loans on real estate	4,998,527	3,085,709
4 Real estate:		
4.1 Properties occupied by the company (less $ 13,890,961 encumbrances)	13,960,874	13,848,153
4.2 Other properties (less $ 0 encumbrances)	167,788,488	3,602,670
5 Collateral loans	0	0
6.1 Cash on hand and on deposit	35,044,355	58,573,369
6.2 Short-term investments	739,398,411	607,147,604
7 Other invested assets	80,378,515	24,070,891
7a Subtotals, cash and invested assets (Items 1 to 7)	4,869,705,941	4,044,871,062
8 Agents' balances or uncollected premiums:		
8.1 Premiums and agents' balances in course of collection	317,892,443	304,273,540
8.2 Premiums, agents' balances and installments booked but deferred and not yet due	60,071,274	36,538,752
9 Funds held by or deposited with reinsured companies	8,533,971	844,155
10 Bills receivable, taken for premiums	86,240,398	87,796,130
11 Reinsurance recoverable on loss payments	144,015,638	120,876,396
12 Federal income tax recoverable	11,434,796	13,964,338
13 Electronic data processing equipment	3,996,608	3,004,972
14 Interest, dividends and real estate income due and accrued	108,483,711	76,930,616
15 Receivable from parent, subsidiaries and affiliates	8,291,990	19,066,307
16 Equities and deposits in pools and associations	14,605,345	13,829,098
17 Other assets	110,304,778	4,339,894
18 Receivable for securities	13,394,356	30,890,198
19 Loss and loss adjustment expenses paid but not charged	51,898,939	46,181,471
20 Participation in funds held by associations for unauthorized companies	22,341,959	16,100,489
21 Reinsurance recoverable on loss expense payments	11,849,687	0
22 TOTALS (Items 7a through 21)	$ 5,809,958,074	$ 4,827,300,786

NOTE: The items on this page to agree with Exhibit 1, Col. 4
The Notes to Financial Statements are an integral part of this statement.

LIABILITIES, SURPLUS AND OTHER FUNDS

			1 Current Year	2 Previous Year
1.	Losses (Part 3A, Column 5, Item 31)		$ 3,084,895,190	$ 2,337,713,951
2.	Loss adjustment expenses (Part 3A, Column 6, Item 31)		964,805,898	908,424,310
3.	Contingent commissions and other similar charges		87,557,812	18,683,233
4.	Other expenses (excluding taxes, licenses and fees)		87,951,478	89,613,980
5.	Taxes, licenses and fees (excluding federal and foreign income taxes)		36,380,349	85,734,787
6.	Federal and foreign income taxes (excluding deferred taxes)		7,093,331	1,937,236
7.	Accounts payable - fixed advances		0	354
8.	Borrowed money		0	0
9.	Interest, including $ 0 on borrowed money		0	0
10.	Unearned premiums (Part 2B, Column 7, Item 31)		944,894,136	790,460,383
11.	Dividends declared and unpaid:			
	(a) Stockholders		0	0
	(b) Policyholders		4,444,742	5,134,555
12.	Funds held by company under reinsurance treaties		164,883,119	159,884,509
13.	Amounts withheld or retained by company for account of others		13,044,612	10,718,363
14a.	Unearned premiums on reinsurance in unauthorized companies	$ 108,995,416		
14b.	Reinsurance on paid losses $ 30,414,742 and on unpaid reported losses $ 358,409,080 and on incurred but not reported losses $ 71,137,755 recoverable from unauthorized companies $ 459,961,577			
14c.	Paid and unpaid allocated loss adjustment expenses recoverable from unauthorized companies $ 8,664,050			
14d.	Less funds held or retained by company for account of such unauthorized companies as per Schedule F, Part 2, Column 6 $ 547,210,337			
15.	Provision for unauthorized reinsurance (Items 14a + 14b + 14c − 14d)		89,408,696	97,409,946
16.	Excess of statutory reserves over statement reserves (Schedule P, Parts 1A, 1B, 1C, 1D and Schedule O)		0	536,374
17.	*Net adjustments in assets and liabilities due to foreign exchange rates		4,961,174	3,881,033
18.	Loss portfolio transfer		2,869,844	3,141,961
19.	Drafts outstanding		65,534,894	96,415,760
20.	Payable to parent, subsidiaries and affiliates		0	2,709,987
21.	Payable for securities		45,051,985	35,849,715
22.	Deferred option income		1,588,813	1,019,932
22 A.	Miscellaneous liabilities		18,888,968	20,125,408
23.	Total liabilities (Items 1 through 22)		$ 4,983,146,888	$ 4,154,357,167
24.	Special surplus funds:			
	(a)			
	(b)			
	(c)			
25A.	Common capital stock		$ 15,376,961	$ 15,226,961
25B.	Preferred capital stock		0	0
25C.				
26A.	Gross paid in and contributed surplus		639,835,503	274,235,503
26B.	Unassigned funds (surplus)		171,599,788	373,481,555
26C.	Less treasury stock, at cost:			
	(1) 0 shares common (value included in Item 25 A $ 0)		0	0
	(2) 0 shares preferred (value included in Item 25 B $ 0)		0	0
27.	Surplus as regards policyholders (Items 24 to 26B, less 26C) (Page 4, Item 40)		826,811,898	662,943,619
28.	TOTALS (Page 2, Item 22)		$ 5,809,958,674	$ 4,817,300,786

UNDERWRITING AND INVESTMENT EXHIBIT

STATEMENT OF INCOME

		1 Current Year	2 Previous Year
	UNDERWRITING INCOME		
1.	Premiums earned (Part 2, Column 4, Item 31)	$ 2,185,177,110	$ 2,084,324,704
	DEDUCTIONS		
2.	Losses incurred (Part 3, Column 7, Item 31)	2,016,191,399	1,646,554,068
3.	Loss expenses incurred (Part 4, Column 1, Item 22)	297,748,706	240,252,610
4.	Other underwriting expenses incurred (Part 4, Column 2, Item 22)	565,543,964	668,556,600
5.			
6.	Total underwriting deductions (Items 2 through 5)	2,879,484,069	2,555,363,278
7.	Net underwriting gain or loss (−) (Item 1 minus 6)	(-) 694,306,959	(-) 471,038,574
	INVESTMENT INCOME		
8.	Net investment income earned (Part 1, Item 10)	374,564,990	315,908,717
9.	Net realized capital gains or losses (−) (Part 1A, Item 11)	119,758,287	180,184,057
9A.	Net investment gain or loss (−) (Items 8 + 9)	494,323,277	496,092,774
	OTHER INCOME		
10.	Net gain or loss (−) from agents' or premium balances charged off (amount recovered $ 4,261,674 amount charged off $ 771,832)	3,489,842	(-) 7,533,383
11.	Finance and service charges not included in premiums (Schedule T, Column 8 total)	2,117,993	2,248,537
12.	Miscellaneous income	(-) 18,072,902	1,429,972
13.	Other expenses - loss portfolio & transfer	0	(-) 1,371,900
14.	Other expenses - sale of agent's balances over 90 days	(-) 5,795,609	(-) 6,079,143
15.			
16.			
17.	Total other income (Items 10 through 16)	(-) 18,380,676	(-) 11,305,517
18.	Net income before dividends to policyholders and before federal and foreign income taxes (Items 7 + 9A + 17)	(-) 218,310,418	13,748,683
18A.	Dividends to policyholders (Exhibit 3, Item 16, plus Page 3, Item 11b, Column 1 minus 2)	82,580,156	71,341,763
18B.	Net income, after dividends to policyholders but before federal and foreign income taxes (Item 18 minus 18A)	(-) 300,890,574	(-) 57,593,080
19.	Federal and foreign income taxes incurred	(-) 4,712,809	(-) 10,103,877
20.	Net income (Item 18B minus 19) (to Item 22)	$ (-) 296,177,765	$ (-) 47,489,203
	CAPITAL AND SURPLUS ACCOUNT		
21.	Surplus as regards policyholders, December 31 previous year (Page 4, Column 2, Item 40)	$ 662,943,619	$ 521,039,030
	GAINS (+) AND LOSSES (−) IN SURPLUS		
22.	Net income (from Item 20)	(-) 296,177,765	(-) 47,489,203
23.	Net unrealized capital gains or losses (Part 1A, Item 12)	73,077,464	(-) 44,409,557
24.	Change in non-admitted assets (Exhibit 2, Item 32, Col. 3)	(-) 895,639	59,375,837
25.	Change in liability for unauthorized reinsurance (Page 3, Item 15, Column 2 minus 1)	68,021,250	(-) 15,579,055
26.	Change in foreign exchange adjustment	1,299,060	(-) 2,075,365
27.	Change in excess of statutory reserves over statement reserves (Page 3, Item 16, Column 2 minus 1)	536,374	(-) 536,374
28.	Capital changes:		
	(a) Paid in (Exhibit 3, Item 9)	0	0
	(b) Transferred from surplus (Stock Divd.)	150,000	300,000
	(c) Transferred to surplus	0	0
29.	Surplus adjustments:		
	(a) Paid in (Exhibit 3, Item 7)	365,600,000	203,293,967
	(b) Transferred to capital (Stock Divd.)	(-) 150,000	(-) 300,000
	(c) Transferred from capital	0	0
30.	Net remittances from or to Home Office (Exhibit 3, Items 4b minus 12b)	0	0
31.	Dividends to stockholders (cash)	(-) 41,500,000	(-) 8,771,685
32.	Change in treasury stock (Page 3, Item 26C (1) and (2), Column 2 minus 1)	0	0
33.	Extraordinary amounts of taxes for prior years	(-) 4,288,468	(-) 784,790
34.	Change in reserve for sick unemployed	87,306	(-) 1,055,884
35.	Change in reserve for municipal bond	(-) 1,058,149	(-) 142,832
36.			
37.			
38.			
39.	Change in surplus as regards policyholders for the year (Items 22 through 38)	163,868,233	141,904,589
40.	Surplus as regards policyholders, December 31 current year (Items 21 plus 39) (Page 3, Item 27)	$ 826,811,852	$ 662,943,619

CASH FLOW

		1 Current Year	2 Previous Year*
1	Premiums collected net of reinsurance	$ 2,309,419,331	
2	Loss and loss adjustment expenses paid (net of salvage and subrogation)	1,635,606,619	
3	Underwriting expenses paid	550,805,088	
4	Other underwriting income (expenses)	(-) 18,158,938	
5	Cash from underwriting (Item 1 minus item 2 minus item 3 plus item 4)	106,890,686	
6	Investment income (net of investment expense)	349,340,989	
7	Other income (expenses)	(-) 17,305,486	
8	Dividends to policyholders paid	83,869,970	
9	Federal income taxes (paid) recovered	7,898,083	
10	Net cash from operations (Item 5 plus item 6 plus item 7 minus item 8 plus item 9)	358,979,958	
11	Proceeds from investments sold, matured or repaid:		
	11.1 Bonds	1,644,714,705	
	11.2 Stocks	318,537,697	
	11.3 Mortgage loans	9,198	
	11.4 Real estate	1,738,571	
	11.5 Collateral loans	0	
	11.6 Other invested assets	889,449	
	11.7 Net gains (+) or losses (-) on cash and short-term investments	0	
	11.8 Miscellaneous proceeds	44,879,384	
	11.9 Total investment proceeds (Items 11.1 thru 11.8)	2,010,138,998	
12	Other cash provided:		
	12.1 Net transfers from affiliates	3,698,236	
	12.2 Borrowed funds received	0	
	12.3 Capital paid in	0	
	12.4 Surplus paid in	200,000,000	
	12.5 Other sources	7,804,412	
	12.6 Total other cash provided (Items 12.1 thru 12.5)	211,466,648	
13	Total (Item 10 plus item 11.9 plus item 12.6)	2,580,511,604	
14	Cost of investments acquired (long-term only):		
	14.1 Bonds	2,004,094,389	
	14.2 Stocks	290,495,691	
	14.3 Mortgage loans	1,375,000	
	14.4 Real estate	758,875	
	14.5 Collateral loans	0	
	14.6 Other invested assets	1,889,427	
	14.7 Miscellaneous applications	14,809,036	
	14.8 Total investments acquired (Items 14.1 thru 14.7)	2,312,992,148	
15	Other cash applied:		
	15.1 Dividends to stockholders paid	41,500,000	
	15.2 Net transfers to affiliates	0	
	15.3 Borrowed funds repaid	0	
	15.4 Other applications	111,247,663	
	15.5 Total other cash applied (Items 15.1 thru 15.4)	152,747,663	
16	Total (Item 14.8 plus item 15.5)	2,465,739,811	
17	Net change in cash and short-term investments (Item 13 minus item 16)	$ 114,771,793	

RECONCILIATION

18	Cash and short-term investments:		
	18.1 Beginning of year	$ 659,670,973	
	18.2 End of year (Item 17 plus item 18.1)	$ 774,442,766	

*Omitted for 1985

UNDERWRITING AND INVESTMENT EXHIBIT

PART 1—INTEREST, DIVIDENDS AND REAL ESTATE INCOME

1	2 Schedule	3 Collected During Year Less Paid For Accrued On Purchases	Paid in Advance		Due and Accrued§		8 Earned During Year 3 + 5 + 6 − 4 − 7
			4 Current Year	5 Previous Year	6 Current Year	7 Previous Year	
1 U.S. government bonds	D*	61,660,880			13,785,441	13,443,951	60,018,890
1.1 Bonds exempt from U.S. tax	D*	153,918,981			54,826,897	58,108,543	156,080,839
1.2 Other bonds (unaffiliated)	D*	56,930,586			9,370,519	5,135,646	61,174,449
1.3 Bonds of affiliates	D*						
2.1 Preferred stocks (unaffiliated)	D	12,546,496			1,113,880	1,700,185	11,959,491
2.11 Preferred stocks of affiliates	D						
2.2 Common stocks (unaffiliated)	D	85,454,605			2,044,346	2,006,064	85,492,887
2.21 Common stocks of affiliates	D						
3 Mortgage loans	B†	940,016			379,095	60,000	361,981
4 Real estate	A§	3,999,079					3,999,079
5 Collateral loans	C						
6.1 Cash on hand and on deposit	E	1,643,899			48,873	809,333	1,686,833
6.2 Short-term investments	DA**	36,105,496			21,354,079	2,489,382	55,160,214
7 Other invested assets	BA						
8 Financial options and futures	DB						
9 Other‡		3,956,979			180,896	(−) 75,730	4,133,644
10 Totals		356,087,310	0	0	108,483,706	77,087,846	381,963,779

	DEDUCTIONS	
11 Total investment expenses incurred (Part 4, Col. 3, Item 22)	6,148,138	
12 Depreciation on real estate (for companies which depreciate annually on a formula basis)	850,651	
13		
14		
15 Total deductions (Items 11 to 14)		6,998,789
16 Net Investment Income Earned (Item 10 minus Item 15—to Page 4, Item 8)		374,964,990

*Includes $ 5,956,016 accrual of discount less $ 1,444,104 amortization of premium.

†Includes $ 0 accrual of discount less $ 0 amortization of premium.

§Includes $ 2,635,483 for company's occupancy of its own buildings.

**Includes $ 0 accrual of discount less $ 0 amortization of premium.

‡Admitted items only. State basis of exclusion None

PART 1A—CAPITAL GAINS AND LOSSES ON INVESTMENTS

1	2 Profit on Sales or Maturity	3 Loss on Sales or Maturity	4 Increases by Adjustment in Book Value	5 Decreases by Adjustment in Book Value	6 Net Gain (+) or Loss (−) from Change in Difference Between Book and Admitted Values	7 Total (Net of Cols. 2 to 6 incl.) (2 − 3 + 4 − 5 + 6)
1 U.S. government bonds	18,621,887	1,918,997				(+) 16,702,870
1.1 Bonds exempt from U.S. tax	37,085,087	22,377,531			(+) 3,107,731	(+) 18,815,287
1.2 Other bonds (unaffiliated)	15,847,858	2,880,046			(−) 46,838	(+) 13,380,918
1.3 Bonds of affiliates						
2.1 Preferred stocks (unaffiliated)	5,758,788	118,698			(+) 4,790,836	(+) 10,430,006
2.11 Preferred stocks of affiliates						
2.2 Common stocks (unaffiliated)	73,081,333	3,656,983			(+) 67,846,880	(+) 137,271,490
2.21 Common stocks of affiliates		1,168,828			(−) 2,710,403	(−) 3,879,831
3 Mortgage loans						
4 Real estate	498,482			‡		(+) 498,482
5 Collateral loans						
6.1 Cash on hand and on deposit						
6.2 Short-term investments						
7 Other invested assets		3,300,000	158			(−) 3,299,842
8 Financial options and futures	1,387,780					(+) 1,387,780
9 Other‡	1,818,711					(+) 1,818,711
10 Totals	154,973,270	36,880,943	158	0	(+) 73,077,306	(+) 190,889,691

(Distribution of Item 10, Col. 7)	
11 Net realized capital gains or losses* (Page 4, Item 9) (Col. 2-3, Item 10)	(+) 119,750,287
12 Net unrealized capital gains or losses* (Page 4, Item 23) (Col. 4 − 5 + 6, Item 10)	(+) 73,077,464

*Attach statement or memorandum explaining basis of division.

‡Excluding $ 850,651 depreciation on real estate included in Part 1, Item 12

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

UNDERWRITING AND INVESTMENT EXHIBIT

PART 2 — PREMIUMS EARNED

Line of Business	1 Net Premiums Written Per Column 4, Part 2C	2 Unearned Premiums Dec. 31 Previous Year — per Col. 3 Last Year's Part 2	3 Unearned Premiums Dec. 31 Current Year — per Col. 7 Part 2B	4 Premiums Earned During Year Cols. 1 + 2 − 3
1 Fire	58,971,125	31,435,494	25,495,766	64,910,853
2 Allied lines	86,474,366	11,444,121	11,018,807	86,899,680
3 Farmowners multiple peril	6,891,725	3,108,165	3,635,917	6,363,973
4 Homeowners multiple peril	103,277,891	50,538,999	53,608,060	100,208,830
5 Commercial multiple peril	338,191,697	137,185,492	165,491,612	309,885,577
8 Ocean marine	35,477,100	9,291,544	11,275,744	33,492,900
9 Inland marine	85,380,797	30,021,050	35,550,899	79,850,948
10				
11 Medical malpractice	5,431,865	1,514,882	1,822,520	5,124,227
12 Earthquake	2,279,875	959,830	1,203,795	2,035,910
13 Group accident and health	5,496,802	140,608	139,473	5,497,937
14 Credit accident and health (group and individual)				
15 Other accident and health	4,928,830	264,093	(-) 292,562	5,485,485
16 Workers' compensation	489,549,480	70,818,995	63,423,995	496,944,480
17 Other liability	944,230,890	198,625,678	695,319,778	447,536,790
19 Auto liability	313,367,731	111,029,581	122,467,120	301,930,192
21 Auto phys. damage	211,082,994	93,851,301	93,401,554	211,532,741
22 Aircraft (all perils)	30,041,890	4,178,524	6,230,859	27,989,555
23 Fidelity	1,321,707	5,658,297	2,741,666	4,238,338
24 Surety	62,992,442	69,298,031	91,167,399	41,123,074
25 Glass	634,655	258,757	229,379	664,033
26 Burglary and theft	941,061	728,347	506,507	1,162,901
27 Boiler and machinery	22,305	16,480	20,877	17,908
28 Credit				
29 International				
30 Reinsurance	19,563,789	38,141	436,005	19,165,925
31 TOTALS	2,339,610,927	790,460,324	944,894,130	2,185,177,121

PART 2A — PREMIUMS IN FORCE

	1 In Force Dec. 31 Last Year Without Deducting Reinsurance	2 Premiums Written or Renewed During Year per Cols. 1 and 2, Part 2C	3 Excess of Original Premiums over Amount Received for Additional Premiums and Reinsurance	4 Deduct Expirations and Excess of Original Premiums over Return Premiums on Cancellations	5 In Force At End of Year 1 + 2 + 3 − 4	6 Deduct Reinsurance in Force (Schedule F) Authorized and Unauthorized Companies	7 Net Premiums in Force 5 − 6	
1	99,119,687	129,184,173	881,554	137,216,807	91,968,607	44,829,571	47,139,036	1
2	39,844,460	50,632,750	106,337	48,296,438	42,287,109	17,761,399	24,525,710	2
3	8,380,150	9,685,105	30,233	9,545,896	8,549,592	2,264,105	6,285,487	3
4	126,349,848	138,393,303	390,877	131,827,725	133,306,303	28,318,870	104,987,433	4
5	362,532,380	488,440,470	159,980	384,443,190	466,689,622	117,308,390	349,381,232	5
8	27,725,900	55,609,373	4,261	50,220,157	33,119,377	6,925,429	26,193,948	8
9	116,372,052	196,436,818	54,545	162,247,663	150,615,752	72,245,873	78,369,879	9
10								10
11	6,307,312	9,496,995	43,302	9,621,782	6,225,827	1,282,886	4,942,941	11
12	2,412,451	4,012,693	725	3,246,590	3,179,279	781,317	2,397,962	12
13	403,274	6,495,394	3,769	6,437,805	464,632	117,858	346,774	13
14								14
15	726,015	7,188,719	0	8,188,576	(-) 273,842	46,135	(-) 319,977	15
16	188,603,609	691,074,942	33,698	704,736,863	174,975,386	43,665,202	131,310,184	16
17	537,189,079	1,111,902,048	607,132	857,568,926	792,129,333	339,907,422	452,221,911	17
19	290,003,845	441,712,881	714,282	387,024,312	345,406,696	81,369,103	264,037,593	19
21	230,807,549	268,298,050	581,309	249,635,465	250,051,443	32,560,931	217,490,512	21
22	41,175,698	147,851,040	9,699	134,196,664	54,839,773	38,009,386	16,830,387	22
23	15,231,356	2,213,892	0	10,044,762	7,400,486	618,781	6,781,705	23
24	148,001,146	128,342,781	0	45,805,816	230,538,111	107,149,297	123,388,814	24
25	720,889	892,140	39	840,301	772,767	161,678	611,089	25
26	2,851,398	1,299,640	4,057	2,787,686	1,367,409	244,056	1,123,353	26
27	1,629,645	3,859,747	0	3,619,666	1,869,726	1,812,528	57,198	27
28								28
29								29
30	60,100	29,842,895	335,700	29,530,267	708,428	138,335	570,093	30
31	2,845,795,107	3,930,866,011	3,881,379	3,404,451,281	2,775,497,216	936,848,552	1,838,648,664	31

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

UNDERWRITING AND INVESTMENT EXHIBIT

PART 2B — RECAPITULATION OF ALL PREMIUMS

†Gross premiums (less reinsurance) and unearned premiums on all unexpired risks and reserve for return premiums under rate credit or retrospective rating plans based upon experience, viz:

Line of Business	Running One Year or Less From Date of Policy		Running More Than One Year from Date of Policy		5	6	7
	1 Premiums in Force†	2 Amount Unearned*	3 Premiums in Force†	4 Amount Unearned*	Advance Premiums (100%)	Reserve for Rate Credits and Retrospective Returns Based on Experience	Total Reserve for Unearned Premiums 2 + 4 + 5 + 6
1 Fire	43,880,087	23,990,470	(a) 3,249,009	1,305,296			25,295,766
2 Allied lines	22,415,187	10,129,007	2,110,583	889,800			11,018,807
3 Farmowners multiple peril	5,319,680	3,091,825	969,859	544,102			3,635,927
4 Homeowners multiple peril	99,933,485	50,936,108	4,823,348	2,511,892	160,660		53,608,660
5 Commercial multiple peril	337,862,954	159,698,693	11,518,278	5,792,919			165,491,612
8 Ocean marine	85,830,816	11,012,788	355,132	217,356		45,600	11,275,744
9 Inland marine	71,484,953	32,981,076	6,084,986	2,369,883			35,350,959
10							
11 Medical malpractice	4,837,804	2,175,574	105,117	31,983		(-) 384,977	1,822,580
12 Earthquake	2,393,894	1,200,885	4,068	2,910			1,203,795
13 Group accident and health	84,989	(-) 104,290	261,785	243,763		(b)	139,473
14 Credit accident and health (group and individual)**							
15 Other accident and health	(-) 321,646	(-) 293,381	1,669	739		(b)	(-) 292,642
16 Workers' compensation	130,032,418	58,782,694	1,277,766	945,993		3,694,908	63,423,595
17 Other liability	413,011,554	203,908,726	39,210,397	19,217,440		32,193,612	255,319,778
19 Auto liability	238,564,891	118,475,154	3,837,161	1,710,116	2,235,541	46,309	122,467,120
21 Auto phys. damage	146,422,950	67,691,236	69,127,535	23,762,353	1,980,087	87,938	93,402,954
22 Aircraft (all perils)	16,807,340	6,218,769	23,047	12,130			6,230,899
23 Fidelity	3,099,788	1,191,565	3,682,003	1,550,101			2,741,666
24 Surety	40,019,368	36,502,081	83,369,446	54,665,318			91,167,399
25 Glass	770,360	209,268	40,129	20,111			229,379
26 Burglary and theft	787,176	327,158	336,177	179,349			506,507
27 Boiler and machinery	57,198	20,572		305			20,877
28 Credit							
29 International							
30 Reinsurance	570,093	436,005					436,005
31 TOTALS	1,603,669,101	788,581,993	230,697,335	116,372,519	4,376,288	35,683,390	944,894,130

†By gross premiums is meant the aggregate of all the premiums written in the policies or renewals in force.
Are they so returned in this statement? Answer: Yes
*State here basis of computation used in each case: Ocean Marine 100% and Monthly Pro Rata, All Other Monthly Pro Rata
**Business not exceeding 120 months duration

PART 2C — PREMIUMS WRITTEN

	Gross Premiums (Less Return Premiums), Including Policy and Membership Fees Written and Renewed During Year			
	1 Direct Business	2 Reinsurance Assumed	3 Reinsurance Ceded	4 Net Premiums Written 1 + 2 − 3
1	84,950,204	44,633,969	79,113,048	50,471,125
2	34,187,864	24,445,464	32,198,382	26,474,366
3	3,357,666	6,387,439	2,793,380	6,951,725
4	75,141,372	63,252,131	35,115,612	103,277,891
5	441,461,287	46,929,243	150,240,773	338,151,697
8	51,034,264	4,575,109	20,132,273	35,477,100
9	171,534,596	24,902,262	111,116,082	85,320,777
10				
11	4,884,167	5,212,888	4,055,130	5,431,865
12	2,970,775	1,053,918	1,738,818	2,279,875
13	5,981,699	573,735	998,598	5,496,808
14				
15	7,080,964	100,155	2,299,889	4,988,830
16	654,505,989	36,968,953	202,525,582	489,549,480
17	960,764,082	151,137,960	567,671,198	544,230,840
19	349,867,194	91,865,687	128,365,150	313,367,731
21	198,609,070	69,688,980	57,215,096	211,082,954
22	106,957,074	41,293,966	117,809,150	30,441,890
23	2,082,442	191,490	898,185	1,321,707
24	127,633,486	799,395	65,350,338	62,992,448
25	871,061	21,079	237,485	654,695
26	814,997	484,643	358,773	941,061
27	1,080,599	1,979,108	3,837,442	22,305
28				
29				
30		29,842,855	10,279,066	19,563,789
31	3,285,085,612	645,780,399	1,598,255,094	2,332,610,917

(a) Including $ 0 reserved for deferred maturity and other similar benefits.
(b) Including $ 0 premium deposits as permitted for assessment units.

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

UNDERWRITING AND INVESTMENT EXHIBIT
PART 3 — LOSSES PAID AND INCURRED

Line of Business	Losses Paid Less Salvage 1 Direct Business	2 Reinsurance Assumed	3 Reinsurance Recovered	4 Net Payments 1 + 2 − 3	5 Net Losses Unpaid Current Year (Part 3A, Col. 5)	6 Net Losses Unpaid Previous Year	7 Losses Incurred Current Year 4 + 5 − 6	8 Ratio Losses Incurred (Col. 7 Part 3) to Premiums Earned (Col. 4 Part 2)	
1 Fire	34,801,156	25,532,282	32,818,942	27,514,496	32,202,361	39,439,594	20,277,263	34.95	1
2 Allied lines	19,621,509	16,681,985	18,956,714	17,346,780	12,979,197	7,838,695	22,487,282	83.60	2
3 Farmowners multiple peril	2,242,901	3,571,412	1,254,285	4,560,028	2,984,188	2,861,532	4,682,685	73.58	3
4 Homeowners multiple peril	48,149,880	37,595,034	17,353,465	68,391,449	31,293,664	30,604,770	69,080,343	68.94	4
5 Commercial multiple peril	207,310,322	33,881,871	63,666,221	177,525,972	307,002,408	262,534,304	221,994,076	71.64	5
8 Ocean marine	32,838,288	2,619,612	14,142,384	21,315,516	42,741,171	42,131,231	21,925,456	65.46	8
9 Inland marine	72,167,197	14,717,736	42,368,690	44,516,243	37,383,769	33,842,835	48,057,177	60.18	9
10									10
11 Medical malpractice	3,670,684	2,150,615	1,688,296	4,133,003	26,705,759	26,914,671	3,924,091	76.58	11
12 Earthquake	42,228	75,114	87,927	29,415	64,735	43,643	50,507	8.48	12
13 Group accident and health	3,620,343	327,680	455,462	3,492,561	1,820,135	1,932,079	3,380,617	61.49	13
14 Credit accident and health (group and individual)*									14
15 Other accident and health	4,988,349	(-) 9,649	1,092,077	3,887,623	1,721,449	2,284,585	3,324,487	60.61	15
16 Workers' compensation	403,829,437	19,238,019	92,378,919	330,688,537	990,981,028	849,662,880	472,006,685	94.98	16
17 Other liability	372,708,375	44,846,730	254,592,750	162,962,355	1,083,657,149	690,404,498	556,215,006	124.28	17
19 Auto liability	233,852,886	52,350,653	53,545,538	232,658,001	313,436,695	295,468,802	250,625,894	83.01	19
21 Auto phys. damage	122,541,023	44,130,063	30,258,824	136,412,262	36,019,485	42,306,459	130,125,288	61.52	21
22 Aircraft (all perils)	69,131,030	80,414,477	70,117,966	79,427,541	19,710,083	14,182,936	84,954,688	89.16	22
23 Fidelity	12,436,481	47,707	5,710,023	6,774,165	5,117,389	19,096,297	(-) 7,204,743	(-) 169.99	23
24 Surety	99,698,404	(-) 22,940	41,052,596	58,622,868	104,510,563	10,224,209	152,909,222	371.83	24
25 Glass	183,175	784	20,826	163,133	74,845	82,859	155,119	82.68	25
26 Burglary and theft	203,844	755,768	403,837	555,775	214,723	415,660	354,838	30.52	26
27 Boiler and machinery	896,550	908,765	1,795,368	9,947	160,355	189,992	(-) 19,690	(-) 109.95	27
28 Credit									28
29 International									29
30 Reinsurance	0	10,304,130	2,242,640	8,061,490	14,457,719	5,637,102	16,882,108	88.06	30
31 TOTALS	1,744,934,062	330,117,836	746,002,738	1,329,049,160	3,024,858,190	2,337,715,951	2,016,191,399	98.87	31

*Business not exceeding 120 months duration

UNDERWRITING AND INVESTMENT EXHIBIT

PART 3A — UNPAID LOSSES AND LOSS ADJUSTMENT EXPENSES

Line of Business	Adjusted or in Process of Adjustment		2 Deduct Reinsurance Recoverable from Authorized and Unauthorized Companies per Schedule F, Part 1A, Sec. 1, Col. 2	3 Net Losses Excl. Incurred But Not Reported 1a + 1b − 2	Incurred But Not Reported			5 Net Losses Unpaid Excluding Loss Adjustment Expenses 3 + 4a + 4b − 4c	6 Unpaid Loss Adjustment Expenses	
	1a Direct	1b Reinsurance Assumed Schedule F, Part 1A, Sec. 2, Col. 2			4a Direct	4b Reinsurance Assumed	4c Reinsurance Ceded			
1 Fire	24,177,491	22,081,015	29,202,836	17,055,670	6,752,484	12,313,224	3,919,017	32,202,361	1,986,984	1
2 Allied lines	11,796,495	13,581,805	15,884,862	9,493,438	1,854,550	1,961,583	330,374	12,979,197	833,969	2
3 Farmowners multiple peril	892,861	1,352,439	417,771	1,827,529	358,587	540,278	142,206	2,584,188	216,731	3
4 Homeowners multiple peril	16,299,272	11,735,957	4,172,844	23,862,385	3,161,880	5,867,130	1,997,731	30,893,664	4,660,180	4
5 Commercial multiple peril	194,380,686	25,535,938	88,354,072	131,562,552	186,737,097	4,311,930	15,549,111	307,062,468	110,775,375	5
8 Ocean marine	30,194,126	4,616,077	11,352,730	23,457,473	24,881,530	1,321,358	6,299,190	42,741,171	5,388,800	8
9 Inland marine	40,508,773	10,883,882	25,984,974	25,347,081	24,852,770	3,840,620	16,696,718	37,383,769	4,100,338	9
10										10
11 Medical malpractice	7,320,579	13,109,149	3,324,772	17,104,956	7,613,475	5,733,117	3,745,789	26,705,759	4,715,469	11
12 Earthquake	7,245	283,046	264,112	26,179	3,461	37,331	2,236	64,735	7,478	12
13 Group accident and health	859,706	89,942	80,395	869,253	961,098	66,373	16,589	(a) 1,880,135	283,851	13
14 Credit accident and health (group and individual)**										14
15 Other accident and health	788,057	1,900	2,751	787,206	1,202,802	110,575	379,134	(a) 1,721,449	207,174	15
16 Workers' compensation	846,958,064	53,139,367	164,539,422	735,558,009	292,668,256	2,918,425	80,163,662	950,981,028	136,582,880	16
17 Other liability	899,390,562	106,730,185	591,650,977	414,469,770	1,123,460,825	272,146,853	686,480,299	1,083,657,149	214,429,747	17
19 Auto liability	221,723,135	35,387,616	20,774,422	236,336,329	85,119,863	20,313,891	20,332,788	313,436,695	57,434,694	19
21 Auto phys. damage	10,822,539	10,303,809	4,283,478	16,842,870	17,604,467	4,271,103	2,698,995	36,019,445	2,475,908	21
22 Aircraft (all perils)	94,878,096	17,124,436	98,293,895	13,708,637	2,653,269	3,438,080	89,963	19,710,023	907,089	22
23 Fidelity	10,452,175	(−) 5,604,181	1,571,481	3,276,513	1,799,341	196,400	154,905	5,117,349	2,761,361	23
24 Surety	108,087,179	22,801	11,079,547	97,030,433	10,968,909	10,189	3,498,968	104,510,563	8,022,838	24
25 Glass	12,950	0	0	12,950	65,137	832	4,674	74,245	13,993	25
26 Burglary and theft	64,897	71,995	39,888	97,004	107,105	62,653	52,039	214,723	54,355	26
27 Boiler and machinery	789,942	888,967	1,518,773	160,136	0	1,513	1,294	160,355	710	27
28 Credit										28
29 International										29
30 Reinsurance	0	7,463,515	1,952,989	5,510,526	0	13,321,748	4,374,555	14,457,719	867,498	30
31 TOTALS	2,520,344,790	388,638,705	1,082,686,591	1,826,296,905	1,732,806,268	252,765,214	786,370,197	3,024,898,190	964,885,292	31

(a) Including $ 0 for present value of life indemnity claims and $ 0 reserved for deferred maternity and other similar benefits.

**Business not exceeding 120 months duration

UNDERWRITING AND INVESTMENT EXHIBIT

PART 4 — EXPENSES

	1 Loss Adjustment Expenses	2 Other Underwriting Expenses	3 Investment Expenses	4 Total
1 Claim adjustment services:				
(a) Direct	237,614,278	0	0	237,614,278
(b) Reinsurance assumed	30,428,747	0	0	30,428,747
(c) Reinsurance ceded	88,989,259	0	0	88,989,259
(d) Net claim adjustment services (a + b − c)	179,053,766	0	0	179,053,766
2 Commission and brokerage:				
(a) Direct	0	465,940,594	0	465,940,594
(b) Reinsurance assumed	0	102,315,382	0	102,315,382
(c) Reinsurance ceded	0	323,257,048	0	323,257,048
(d) Contingent — net	0	33,092,090	0	33,092,090
(e) Policy and membership fees	0	0	0	0
(f) Net commission and brokerage (a + b − c + d + e)	0	278,110,738	0	278,110,738
3 Allowances to managers and agents	37	3,097,579	0	3,097,616
4 Advertising	68,180	5,272,491	13	5,340,684
5 Boards, bureaus and associations	479,313	11,038,953	48	11,518,314
6 Surveys and underwriting reports	2,475	3,698,209	(-) 6	3,700,678
7 Audit of assureds' records	697	668,119	0	668,816
8 Salaries	59,469,170	128,174,743	1,149,848	188,793,761
9 Employee relations and welfare	10,001,120	(-) 77,107,984	134,300	(-) 66,972,564
10 Insurance	493,630	1,381,071	59,589	1,934,290
11 Directors' fees	29,778	97,826	2,698	130,302
12 Travel and travel items	3,959,755	11,643,719	12,479	15,615,953
13 Rent and rent items	10,891,350	28,227,569	135,138	39,254,059
14 Equipment	4,534,092	9,964,643	43,642	14,542,377
15 Printing and stationery	2,630,753	5,938,121	21,968	8,590,842
16 Postage, telephone and telegraph, exchange and express	5,278,227	10,455,120	37,649	15,770,996
17 Legal and auditing	380,769	2,639,062	215,260	3,235,091
17a Totals (Items 3 to 17)	98,113,334	145,405,321	1,818,980	245,355,275
18 Taxes, licenses and fees:				
(a) State and local insurance taxes	4,485	63,334,430	82	63,338,997
(b) Insurance department licenses and fees	184	1,311,488	13	1,311,685
(c) Payroll taxes	4,726,164	10,732,793	54,210	15,513,167
(d) All other (excluding federal and foreign income and real estate)	10,356	12,734,235	43,055	12,787,646
(e) Total taxes, licenses and fees (a + b + c + d)	4,741,189	88,112,946	97,360	92,951,495
19 Real estate expenses	0	0	2,881,278	2,881,278
20 Real estate taxes	0	0	653,697	653,697
21 Miscellaneous (itemize)				
(a) Contributions	102,023	361,620	14,048	477,691
(b) Outside services	15,302,272	53,060,023	1,134,807	69,497,102
(c) Other	436,183	493,316	154,489	1,083,988
22 Total expenses incurred	297,748,707	565,543,964	6,148,139	869,440,810
23 Less unpaid expenses — current year	564,885,292	90,603,756	1,205,883	656,694,931
24 Add unpaid expenses — previous year	508,424,310	75,862,880	1,169,060	585,456,250
25 TOTAL EXPENSES PAID (Items 22 − 23 + 24)	241,287,725	550,803,088	6,111,316	798,202,129

EXHIBIT 1—ANALYSIS OF ASSETS

		1 Ledger Assets	2 Non-Ledger Including Excess of Market (or Amortized) Over Book Values	3 Assets Not Admitted Including Excess of Book Over Market (or Amortized) Values	4 Net Admitted Assets (Cols. 1 + 2 − 3)
1	Bonds (Schedule D)	$ 3,136,167,539	$ 0	$ 13,156,618	$ 3,123,010,921
2	Stocks (Schedule D)				
	2.1 Preferred stocks	95,941,787	3,048,166	16,408	98,973,545
	2.2 Common stocks	520,819,908	130,530,161	4,813,694	646,536,375
3	Mortgage loans on real estate (Schedule B)				
	(a) First liens	4,591,517	0	0	4,591,517
	(b) Other than first liens	0	0	0	0
4	Real estate, less encumbrances (Schedule A)	181,757,308	0	0	181,757,308
5	Collateral loans (Schedule C)	0	0	0	0
6.1	Cash on hand and on deposit				
	(a) Cash in company's office	193,971	0	0	193,971
	(b) Cash on deposit (Schedule N)	34,850,384	0	0	34,850,384
6.2	Short-term investments (Schedule DA)	739,398,411	0	0	739,398,411
7	Other invested assets (Schedule BA)	80,391,515	0	0	80,391,515
8	Agents' balances or uncollected premiums (net as to commissions and dividends)				
	8.1 Premiums and agents' balances in course of collection (after deducting ceded reinsurance balances payable of $ 260,802,093)	327,679,957	0	388,514	327,291,443
	8.2 Premiums, agents' balances and installments booked but deferred and not yet due (after deducting ceded reinsurance balances payable of $ 0)	60,071,174	0	0	60,071,174
9	Funds held by or deposited with reinsured companies	2,572,906	0	38,935	2,533,971
10	Bills receivable, taken for premiums	88,043,400	0	1,803,002	86,240,398
11	Reinsurance recoverable on loss payments (Schedule F Part 1A, Col. 5)	144,015,638	0	0	144,015,638
12	Federal income tax recoverable	0	11,434,796	0	11,434,796
13	Electronic data processing equipment	3,963,576	0	6,968	3,956,608
14	Interest, dividends and real estate income due and accrued	0	102,483,711	0	102,483,711
15	Receivable from parent, subsidiaries and affiliates	12,843,078	0	4,551,088	8,291,990
16	Equities and deposits in pools and associations	15,723,483	0	1,118,138	14,605,345
17	Other assets (give items and amounts)				
	17.1 Equipment, furniture and supplies	31,061,592	0	31,061,592	xxxxx
	17.2 Bills receivable, not taken for premiums	0	0	0	xxxxx
	17.3 Loans on personal security, endorsed or not	0	0	0	xxxxx
	17.4 Miscellaneous	130,892,142	0	20,587,364	110,304,778
18	Receivable for securities	13,394,356	0	0	13,394,356
19	Loss and loss adjustment expenses paid but not charged	0	51,898,939	0	51,898,939
20	Participation in funds held by Assns. for unauthorized companies	0	22,541,999	0	22,541,999
21	Fixed and temporary advances	473,589	0	473,589	0
22	Reinsurance recoverable on loss expense payments	11,249,687	0	0	11,249,687
23	TOTAL	$ 5,366,090,758	$ 321,877,738	$ 78,009,050	$ 5,609,958,678

EXHIBIT 2—ANALYSIS OF NON-ADMITTED ASSETS

Excluding Excess of Book over Market (or Amortized) Values and Item 14, Col. 3, Exhibit 1

		1 End of Previous Year	2 End of Current Year	3 Change for Year Increase (−) or Decrease (+) (Col. 1 − 2)
23	Loans on company's stock	0	0	0
24	Deposits in suspended depositories, less estimated amount recoverable	0	0	0
25	Agents' balances or uncollected premiums over three months due			
	25.1 Premiums and agents' balances in course of collection	579,259	388,514	(+) 196,745
	25.2 Premiums, agents' balances and installments booked but deferred and not yet due	0	0	0
26	Bills receivable, past due, taken for premiums	2,415,264	1,803,002	(+) 612,262
27	Excess of bills receivable, not past due, taken for risks over the unearned premiums thereon	0	0	0
28	Equipment, furniture and supplies	31,998,996	31,061,592	(+) 937,404
29	Bills receivable, not taken for premiums	0	0	0
30	Loans on personal security, endorsed or not	0	0	0
31	Other assets not admitted (itemize)			
	(a) Funds held by or deposited with ceding reinsurers	60,351	38,935	(+) 21,416
	(b) Deposits with or equity in underwriting assns.	1,339,665	1,118,138	(+) 221,527
	(c) Miscellaneous assets	21,946,762	20,587,364	(+) 1,359,398
	(d) Fixed and temporary advances	366,675	473,589	(−) 106,914
	(e) Receivable from affiliates	440,519	4,551,088	(−) 4,110,569
	(f) Electronic data processing equipment	0	6,968	(−) 6,968
	(g)			
	(h)			
	(i)			
	(j)			
32	Total change (Col. 3) (Carry to Item 21, Page 4)	xxxxx	xxxxx	(−) 895,639

EXHIBIT 3 — RECONCILIATION OF LEDGER ASSETS

INCREASE IN LEDGER ASSETS

Net premiums written (Part 2, Col. 1, Item 31)	$ 2,339,610,527
Interest, dividends and real estate income received (Part 1, Item 10, Col. 7)	356,827,319
From sale or maturity of ledger assets (Part 1A, Col. 2, Item 10)	154,373,170
Other income items or increases, viz:	
(a) Agents' balances previously charged off	3,429,841
(b) Remittances from home office to U.S. branch (gross)	0
(c) Funds held under reinsurance treaties (net)	0
(d) Borrowed money (gross)	0
(e) Amounts withheld or retained for account of others (net)	2,326,249
(f) Finance and service charges not included in premium	2,117,993
(g) Deferred option income	509,861
(h) Payable for securities	9,202,270
(i) Federal income tax recoverable	1,881,669
(j) Consolidation of New Insurance Companies	1,193,374
(k)	
(l)	
Increase in book value of ledger assets (Part 1A, Item 10, Col. 4)	158
Capital paid in (Page 4, Item 28a)	0
Surplus paid in (Page 4, Item 29a)	365,600,000
Total (Items 1 to 7)	$ 3,236,672,282

DECREASE IN LEDGER ASSETS

Losses paid (Part 3, Col. 4, Item 31)	$ 1,389,049,160
Expenses paid (Part 4, Item 25, Col. 4)	798,208,128
From sale or maturity of ledger assets (Part 1A, Col. 3, Item 10)	34,880,943
Other disbursement items or decreases, viz:	
(a) Agents' balances charged off	0
(b) Remittances to home office from U.S. branch (gross)	0
(c) Funds held under reinsurance treaties (net)	1,382,860
(d) Borrowed money (gross)	0
(e) Amounts withheld or retained for account of others (net)	0
(f) Other income	18,072,901
(g) Deferred option income	0
(h) Sale of agent's balances over 90 days	5,795,609
(i) Payable to affiliates	3,005,512
(j) Miscellaneous liabilities	3,087,292
(k) Drafts outstanding	36,998,334
(l) Extraordinary amounts of taxes for prior years	4,288,468
(m) Accounts payable - fixed advances	304
(n) Loss portfolio transfer	876,717
Decrease in book value of ledger assets (Part 1A, Item 10, Col. 5) and depreciation (Item 12, Part 1)	690,631
Federal and foreign income taxes paid	(-) 9,452,995
Dividends paid stockholders	41,500,000
Dividends to policyholders on direct business, less $ 229,362 dividends on reinsurance assumed or ceded (net)	83,269,970
Total (Items 9 to 18)	$ 2,351,287,854

RECONCILIATION BETWEEN YEARS

Amount of ledger assets as per balance December 31 of previous year	$ 4,680,706,425
Increase (+) or decrease (-) in ledger assets during the year (Item 8 minus Item 19)	(+) 885,384,367
Balance in ledger assets December 31 of current year	$ 5,566,090,792

ANNUAL STATEMENT FOR THE YEAR 1986 OF THE CRUM & FORSTER INSURANCE COMPANIES

EXHIBIT OF PREMIUMS AND LOSSES

BUSINESS IN THE STATE OF DURING THE YEAR

1 Line of Business	Gross Premiums, Including Policy and Membership Fees, Less Return Premiums and Premiums on Policies Not Taken		4 Dividends Paid or Credited to Policyholders on Direct Business	5 Direct Losses Paid (deducting salvage)	6 Direct Losses Incurred	7 Direct Losses Unpaid
	2 Direct Premiums Written	3 Direct Premiums Earned*				
1. Fire						
2. Allied lines						
3. Farmowners multiple peril						
4. Homeowners multiple peril						
5. Commercial multiple peril						
8. Ocean marine						
9. Inland marine						
10.						
11. Medical malpractice						
12. Earthquake						
13. Group accident and health						
14. Credit A & H (Group and individual)						
15.1 Collectively renewable A & H						
15.2 Non-cancellable A & H						
15.3 Guaranteed renewable A & H						
15.4 Non-renewable for stated reasons only						
15.5 Other accident only						
15.6 All other A & H						
16. Workers' compensation						
17. Other liability						
19.1 Private passenger auto no-fault (personal injury protection)						
19.2 Other private passenger auto liability						
19.3 Commercial auto no-fault (personal injury protection)						
19.4 Other commercial auto liability						
21.1 Private passenger auto physical damage						
21.2 Commercial auto physical damage						
22. Aircraft (all perils)						
23. Fidelity						
24. Surety						
25. Glass						
26. Burglary and theft						
27. Boiler and machinery						
28. Credit						
31. TOTALS						

Finance and service charges not included in Lines 1 to 31 $

*Direct premiums earned may be estimated by formula on the basis of country-wide ratios for the respective lines of business except where adjustments are required to recognize special situations.

CREDIT ACCIDENT AND HEALTH INSURANCE
(Included in the Above Exhibit)

1	2 Direct Premiums (Excluding Reinsurance Accepted and without Deduction of Reinsurance Ceded)	3 Direct Premiums Earned (prior to Dividends and Retrospective Rate Credits Paid or Credited)	4 Dividends Paid or Credited on Direct Business	5 Direct Losses Paid	6 Direct Losses Incurred	7 Direct Losses Unpaid
32.1 Group A & H Policies — Loans of 60 or LESS months' duration						
32.2 Group A & H Policies — Loans of GREATER THAN 60 MONTHS' DURATION BUT NOT GREATER THAN 120 MONTHS						
33 Other A & H Policies						
34 TOTALS (Items 32.1 + 32.2 + 33)						

SCHEDULE OF EXAMINATION FEES AND EXPENSES

1 Type of Exam (a)	2 State Initiating Exam (b)	3 States Participating (b)	4 Date Begun	5 Date Completed	6 Date Report Published	Fees and Expenses Incurred in Current Year		9 Offsetting Credits, if Any
						7 Amount (c)	8 State (b)	
M	MD	MD	9/83	10/83	N/A	16,329	MD	NONE
M	VT	NJ	5/83	11/83	N/A	5,892	NJ	NONE
					TOTALS	22,221	XXXX	0

(a) "M" for marketing conduct, "F" for financial condition; describe others.
(b) 2 digit post office abbreviation
(c) Show amount paid to each state or representatives thereof separately. The total amount plus $ 1,289,404 for other state insurance department licenses and fees should agree with Page 11, Column 4, Item 18b

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

FIVE-YEAR HISTORICAL DATA

All Figures Taken From or Developed From Annual Statements of Corresponding Years

Show amounts in whole dollars only, no cents; show rates and percentages to one decimal place, i.e. 17.6

		1 1985	2 1984	3 1983	4 1982	5 1981
	Gross Premiums Written (Page 8, Part 2C, Cols. 1 & 2)					
1	Liability Lines (Items 11, 16, 17 & 19)	2,294,186,862	1,664,193,953	1,257,927,346	1,183,121,999	1,166,742,327
2	Property Lines (Items 1, 2, 9, 12, 21, 25 & 26)	698,756,272	545,706,390	526,627,506	438,579,888	400,281,815
3	Property and Liability Combined Lines (Items 3, 4, 5, 8, 22 & 27)	843,839,236	639,096,936	532,746,887	485,276,100	465,074,773
4	All Other Lines (Items 10, 13, 14, 15, 23, 24, 28, 29 & 30)	174,083,641	155,157,173	62,476,993	42,947,551	41,549,205
5	Total (Item 31)	3,930,866,011	3,004,114,012	2,379,778,732	2,149,985,138	2,073,648,120
	Net Premiums Written (Page 8, Part 2C, Col. 4)					
6	Liability Lines (Items 11, 16, 17 & 19)	1,358,779,866	1,177,097,172	1,015,723,604	942,170,091	930,602,576
7	Property Lines (Items 1, 2, 9, 12, 21, 25 & 26)	378,526,873	368,023,088	387,263,901	346,245,358	326,118,455
8	Property and Liability Combined Lines (Items 3, 4, 5, 8, 22 & 27)	513,908,608	461,943,133	421,180,331	382,120,179	354,187,812
9	All Other Lines (Items 10, 13, 14, 15, 23, 24, 28, 29 & 30)	94,303,770	102,887,574	49,215,095	35,809,461	33,669,885
10	Total (Item 31)	2,339,610,527	2,109,950,967	1,873,382,931	1,706,345,089	1,644,578,728
	Statement of Income (Page 4)					
11	Net Underwriting Gain or Loss (Item 7)	(-) 694,306,999	(-) 471,038,974	(-) 173,167,816	(-) 176,084,801	(-) 23,542,251
12	Net Investment Gain or Loss (Item 9A)	494,317,217	496,092,774	279,672,537	296,121,310	234,756,736
13	Total Other Income (Item 17)	(-) 18,380,676	(-) 11,305,517	(-) 4,823,398	1,938,668	2,632,973
14	Dividends to Policyholders (Item 18)	58,580,136	71,341,763	96,509,995	41,669,445	69,720,634
15	Federal and Foreign Income Taxes Incurred (Item 19)	(-) 4,712,809	(-) 10,103,877	(-) 4,640,999	(-) 14,081	(-) 1,388,272
16	Net Income (Item 20)	(-) 296,277,765	(-) 47,489,203	9,812,327	51,379,813	145,515,096
	Balance Sheet Items (Pages 2 and 3)					
17	Total Admitted Assets (Page 2, Item 22)	5,809,958,694	4,817,300,786	4,059,694,979	3,973,276,814	3,764,583,678
18	Agents' Balances or Uncollected Premiums (Page 2):					
	18.1 In Course of Collection (Item 8.1)	317,798,445	304,273,540	271,962,867	257,513,025	298,342,144
	18.2 Deferred and Not Yet Due (Item 8.2)	60,071,174	36,538,752	29,851,893	22,863,196	16,537,078
19	Total Liabilities (Page 3, Item 23)	4,983,146,802	4,154,357,167	3,538,695,949	3,302,063,741	3,111,630,715
20	Losses (Page 3, Item 1)	3,084,898,190	2,337,715,951	2,030,172,063	1,847,104,784	1,704,505,529
21	Loss Adjustment Expenses (Page 3, Item 2)	964,885,292	908,424,310	473,312,574	445,620,695	405,390,236
22	Unearned Premiums (Page 3, Item 10)	944,894,130	790,460,323	751,482,232	695,178,275	670,838,974
23	Capital (Page 3, Items 25A and 25B)	15,376,961	19,226,961	15,986,961	16,534,771	16,528,771
24	Surplus as Regards Policyholders (Page 3, Item 27)	826,811,892	662,943,619	520,999,030	671,213,073	652,952,963
	Percentage Distribution of Cash and Invested Assets (Page 2) (Item divided by Page 2, Item 7a) x 100.0					
25	Bonds (Item 1)	64.4	66.7	72.5	78.5	80.1
26	Stocks (Items 2.1 and 2.2)	15.4	15.9	20.7	20.1	17.9
27	Mortgage Loans on Real Estate (Item 3)	.1	0.1	0.0	0.0	0.0
28	Real Estate (Items 4.1 and 4.2)	3.7	0.4	1.0	1.0	1.1
29	Collateral Loans (Item 5)	0.0	0.0	0.0	0.0	0.0
30	Cash and short-term investments (Items 6.1 and 6.2) (1981, Item 6)	16.0	16.3	5.6	0.4	0.8
31	Other Invested Assets (Item 7)	.4	0.6	0.2	0.0	0.1
32	Cash and Invested Assets (Item 7a)	100.0	100.0	100.0	100.0	100.0
	Investment in Parent, Subsidiaries and Affiliates					
33	Affiliated Bonds (Page 23, Item 29, Col. 6)	0	0	0	715,000	11,440,000
34	Affiliated Preferred Stocks (Pages 23, Item 47, Col. 3)	0	0	0	0	0
35	Affiliated Common Stocks (Page 23, Item 66, Col. 3)	43,782,835	47,582,301	23,055,764	15,657,315	19,302,842
36	Affiliated Short-Term Investments (Schedule DA, Part 1, Col. 10)	0	0	0	0	0
37	Total of above Items 33, 34, 35 & 36	43,782,835	47,582,301	23,055,764	16,372,315	30,742,842
38	Percentage of Investments in Parent, Subsidiaries and Affiliates to Surplus as Regards Policyholders (Item 37 above divided by Page 3, Col. 1, Item 27 x 100.0)	5.3	7.2	4.4	2.4	4.7

FIVE-YEAR HISTORICAL DATA
(Continued)

	1 1985	2 1984	3 1983	4 1982	5 1981
Capital and Surplus Accounts (Page 4)					
Net Unrealized Capital Gains or Losses (Item 23)	73,077,464	(-) 44,409,997	(-) 29,358,062	69,564,533	(-) 104,377,848
Dividends to Stockholders (Cash) (Item 31)	41,500,000	8,771,625	69,150,000	76,831,974	55,360,000
Change in Surplus as Regards Policyholders for the Year (Item 38)	163,868,235	141,904,309	(-) 130,174,043	18,227,120	13,285,499
Gross Losses Paid (Page 9, Part 3, Cols. 1 & 2)					
Liability Lines (Items 11, 16, 17 & 19)	1,132,647,427	1,003,967,314	709,194,856	605,732,790	504,799,012
Property Lines (Items 1, 2, 9, 12, 21, 25 & 26)	351,453,864	367,176,963	309,213,498	282,269,084	233,982,121
Property and Liability Combined Lines (Items 3, 4, 5, 8, 22 & 27)	499,960,182	415,010,697	324,602,453	305,389,943	255,780,474
All Other Lines (Items 10, 13, 14, 15, 23, 24, 28, 29 & 30)	131,390,505	38,888,112	29,038,563	19,213,827	14,282,410
Total (Item 31)	2,075,051,898	1,824,963,286	1,372,049,310	1,213,605,646	1,008,790,817
Net Losses Paid (Page 9, Part 3, Col. 4)					
Liability Lines (Items 11, 16, 17 & 19)	730,441,896	729,790,750	596,886,179	497,929,782	484,154,348
Property Lines (Items 1, 2, 9, 12, 21, 25 & 26)	286,538,124	282,648,273	220,088,234	226,593,139	169,932,069
Property and Liability Combined Lines (Items 3, 4, 5, 8, 22 & 27)	291,230,453	310,294,985	205,747,682	234,378,977	143,099,058
All Other Lines (Items 10, 13, 14, 15, 23, 24, 28, 29 & 30)	80,838,707	31,691,026	23,137,402	15,338,410	11,925,373
Total (Item 31)	1,389,049,160	1,354,424,976	1,045,859,416	976,440,227	809,111,030
Operating Ratios (Page 4) (Item divided by Page 4, Item 1) x 100.0					
Premiums Earned (Item 1)	100.0	100.0	100.0	100.0	100.0
Losses Incurred (Item 2)	92.3	79.0	67.6	66.4	59.9
Loss Expenses Incurred (Item 3)	13.6	11.5	10.3	11.5	11.3
Other Underwriting Expenses Incurred (Item 4)	25.9	32.1	33.8	32.6	30.2
Net Underwriting Gain or (Loss) (Item 7)	(-) 31.8	(-) 22.6	(-) 11.7	(-) 10.5	(-) 1.9
Other Ratios					
Other Underwriting Expenses to Net Premiums Written (Page 4, Items 4 + 5 – 17 divided by Page 8, Part 2C, Col. 4, Item 31 x 100.0)	25.0	31.7	33.0	32.0	29.9
Losses and Loss Expenses Incurred to Premiums Earned (Page 4, Items 2 + 3 divided by Page 4, Item 1 x 100.0)	105.9	90.5	78.0	77.9	71.3
Net Premiums Written to Policyholders' Surplus (Page 8, Part 2C, Col. 4, Item 31, divided by Page 3, Item 27, Col. 1 x 100.0)	283.0	318.2	399.5	294.2	251.9
One Year Loss Development (000 omitted) Schedule "O", Page 54					
Development in estimated liability on unpaid losses incurred prior to current year (Part 1, Item 31, Col. 18)	19,718	10,037	(-) 575	(-) 3,636	(-) 4,516
Development in estimated liability for loss expenses on losses incurred prior to current year (Part 2, Item 31, Col. 18)	1,769	494	(-) 6,093	1,763	16
Schedule "P", Page 59					
Development in estimated losses and loss expenses incurred prior to current year (Part 2, Item 11, Col. 7 less Col. 6)	68,090	45,333	(-) 27,317	(-) 15,010	(-) 144,138
Total of above items 60, 61 & 62	89,577	55,864	(-) 33,985	(-) 16,883	(-) 148,638
Ratio of development of loss and loss expenses incurred to policyholders' surplus of previous year end (Item 63 above divided by Page 4, Item 21, Col. 1 x 100.0)	13.5	10.7	(-) 5.1	(-) 2.6	(-) 22.3
Two Year Loss Development (000 omitted) Schedule "O", Page 54					
Development in estimated liability on unpaid losses incurred 2 years before the current year and prior (Part 1, Item 31, Col. 19)	(-) 1,630	(-) 482	1,584	(-) 13,352	(-) 3,848
Development in estimated liability for loss expenses on losses incurred 2 years before the current year and prior (Part 2, Item 31, Col. 19)	(-) 444	(-) 4,885	61	853	1,965
Schedule "P", Page 59					
Development in estimated losses and loss expenses incurred 2 years before the current year and prior (Part 2, Item 9, Col. 7 less Col. 5)	17,367	(-) 69,183	(-) 105,610	(-) 120,574	(-) 107,729
Total of above items 65, 66 & 67	15,293	(-) 74,550	(-) 103,965	(-) 133,073	(-) 101,916
Ratio of development of loss and loss expenses incurred to reported policyholders' surplus of second previous year end (Item 68 above divided by Page 4, Item 21, Col. 2 x 100.0)	2.9	11.1	(-) 15.9	(-) 20.0	(-) 21.5

SCHEDULE D — SUMMARY BY COUNTRY

Long-Term Bonds and Stocks OWNED December 31 of Current Year

1 Description		2 Book Value	3 *Market Value (Excluding accrued interest)	4 Actual Cost (Excluding accrued interest)	5 Par Value of Bonds	6 *Amortized or Investment Value
BONDS Governments (Including all obligations guaranteed by governments)	1 United States	1,155,157,282	1,220,637,680	1,155,156,806	1,170,684,365	1,155,157,282
	2 Canada	24,980,595	22,865,300	24,984,437	25,000,000	24,980,595
	3 Other Countries	0	0	0	0	0
	4 Totals	1,180,137,877	1,243,502,980	1,180,141,243	1,195,684,365	1,180,137,877
States, Territories and Possessions (Direct and guaranteed)	5 United States	131,284,018	133,836,174	129,852,047	144,915,000	131,284,018
	6 Canada	2,519,996	2,519,996	2,496,212	2,810,000	2,519,996
	7 Other Countries	0	0	0	0	0
	8 Totals	133,804,014	136,356,170	132,348,259	147,725,000	133,804,014
Political Subdivisions of States, Territories and Possessions (Direct and guaranteed)	9 United States	133,039,975	133,039,975	131,810,146	141,535,400	133,039,975
	10 Canada	11,710,384	11,710,384	11,739,238	11,725,000	11,710,384
	11 Other Countries	1,200,000	1,200,000	1,200,000	1,200,000	1,200,000
	12 Totals	145,950,359	145,950,359	144,749,384	154,460,400	145,950,359
Special revenue and special assessment obligations and all non-guaranteed obligations of agencies and authorities of governments and their political subdivisions	13 United States	1,585,409,086	1,626,858,137	1,974,118,595	1,793,094,735	1,572,757,482
	14 Canada	2,953,552	2,953,552	2,962,089	1,599,244	2,953,552
	15 Other Countries	0	0	0	0	0
	16 Totals	1,588,362,638	1,629,811,689	1,977,080,684	1,794,693,979	1,575,710,976
Railroads (unaffiliated)	17 United States	24,775	15,600	27,982	24,000	24,775
	18 Canada	0	0	0	0	0
	19 Other Countries	0	0	0	0	0
	20 Totals	24,775	15,600	27,982	24,000	24,775
Public Utilities (unaffiliated)	21 United States	43,699,036	43,419,450	43,655,709	41,105,000	43,699,036
	22 Canada	4,495,400	3,708,229	4,491,875	5,850,000	4,495,400
	23 Other Countries	0	0	0	0	0
	24 Totals	48,194,436	47,127,679	48,147,584	46,955,000	48,194,436
Industrial and Miscellaneous (unaffiliated)	25 United States	30,525,515	30,124,498	30,498,961	31,318,000	30,525,515
	26 Canada	8,770,966	7,648,368	8,758,380	8,850,000	8,266,012
	27 Other Countries	437,019	437,019	371,752	473,000	437,019
	28 Totals	39,733,500	38,209,885	39,629,093	40,641,000	39,228,546
Parent, Subsidiaries, and Affiliates	29 Totals	0	0	0	0	0
	30 Total Bonds	3,136,167,539	3,270,974,182	3,122,124,152	3,380,083,744	3,123,010,984
PREFERRED STOCKS Railroads (unaffiliated)	31 United States	0	0	0		
	32 Canada	0	0	0		
	33 Other Countries	0	0	0		
	34 Totals	0	0	0		
Public Utilities (unaffiliated)	35 United States	68,958,030	72,368,248	68,958,030		
	36 Canada	7,012,500	6,163,134	7,012,500		
	37 Other Countries	0	0	0		
	38 Totals	75,970,530	78,531,382	75,970,530		
Banks, Trust and Insurance Companies (unaffiliated)	39 United States	1,038,414	1,218,915	1,038,414		
	40 Canada	1,111,093	1,093,397	1,111,093		
	41 Other Countries	0	0	0		
	42 Totals	2,149,507	2,312,312	2,149,507		
Industrial and Miscellaneous (unaffiliated)	43 United States	13,651,748	14,215,721	13,651,748		
	44 Canada	4,370,000	3,914,140	4,370,000		
	45 Other Countries	0	0	0		
	46 Totals	18,021,748	18,129,861	18,021,748		
Parent, Subsidiaries, and Affiliates	47 Totals	0	0	0		
	48 Total Preferred Stocks	96,141,785	98,973,545	96,141,785		
COMMON STOCKS Railroads (unaffiliated)	49 United States	8,184,204	10,052,750	8,184,204		
	50 Canada	0	0	0		
	51 Other Countries	0	0	0		
	52 Totals	8,184,204	10,052,750	8,184,204		
Public Utilities (unaffiliated)	53 United States	82,213,985	104,666,098	82,213,985		
	54 Canada	0	0	0		
	55 Other Countries	0	0	0		
	56 Totals	82,213,985	104,666,098	82,213,985		
Banks, Trust and Insurance Companies (unaffiliated)	57 United States	49,171,297	65,251,338	49,171,297		
	58 Canada	0	0	0		
	59 Other Countries	0	0	0		
	60 Totals	49,171,297	65,251,338	49,171,297		
Industrial and Miscellaneous (unaffiliated)	61 United States	328,374,745	422,773,402	328,374,745		
	62 Canada	0	0	0		
	63 Other Countries	30,000	29,992	30,000		
	64 Totals	328,404,745	422,803,394	328,404,745		
Parent, Subsidiaries, and Affiliates	65 Totals	52,645,677	43,762,835	52,645,677		
	66 Total Common Stocks	520,619,908	646,536,375	520,619,908		
	67 Total Stocks	616,761,693	745,509,920	616,761,693		
	68 Total Bonds and Stocks	3,752,929,232	4,016,484,102	3,738,885,845		

*"Statement" value for preferred stocks. For certain bonds, values other than actual market may appear in this column (See Schedule D Part 1, for details). The aggregate value of bonds which are valued at other than actual market is $ 1,887,047,722

*Companies, societies, and associations which do not amortize their bonds should leave this column blank.

SCHEDULE D — VERIFICATION BETWEEN YEARS

1 Book value of bonds and stocks, per items 1 and 2, Col. 1, Exhibit 1, previous year ____________
2 Cost of bonds and stocks acquired, Col. 5, Part 3 ____________
3 Increase by adjustment in book value:
(a) Col. 10, Part 1 ____________
(b) Col. 9, Part 2, Sec. 1 ____________
(c) Col. 8, Part 2, Sec. 2 ____________
(d) Col. 9, Part 4 ____________ ____________
4 Profit on disposal of bonds and stocks, Col. 11, Part 4 ____________
5 Total ____________

6 Deduct consideration for bonds and stocks disposed of, Col. 5, Part 4 ____________
7 Decrease by adjustment in book value:
(a) Col. 11, Part 1 ____________
(b) Col. 10, Part 2, Sec. 1 ____________
(c) Col. 9, Part 2, Sec. 2 ____________
(d) Col. 10, Part 4 ____________ ____________
8 Loss on disposal of bonds and stocks, Col. 12, Part 4 ____________
9 Book value of bonds and stocks, per items 1 and 2, Col. 1, Exhibit 1, current year ____________

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

SCHEDULE D—PART 1A

°1 ⌈

Maturity Distribution of Long-Term Bonds Owned December 31, Current Year
at Statement Values

1 Maturity	2 Governments Schedule D (Group 1)	3 Political Subdivisions, Governmental Agencies and Authorities (Groups 2, 3 & 4)	4 Other (Unaffiliated) (Groups 5, 6 & 7)	5 Parent, Subsidiaries and Affiliates (Group 8)	6 Total Bonds
1 1 year or less	16,846,787	6,918,454	437,815		24,808,436
2 Over 1 year through 3 years	88,634,783	10,839,498	5,844,375		30,118,636
3 Over 3 years through 5 years	46,766,683	27,019,881	8,095,941		81,881,805
4 Over 5 years through 10 years	305,868,605	137,386,190	18,796,380		451,489,161
5 Over 10 years through 15 years	7,109,369	885,760,399	45,760,320		898,637,946
6 Over 15 years through 20 years	93,077,136	444,463,647	4,741,986		518,880,777
7 Over 20 years	686,836,788	1,088,639,710	16,383,710		1,791,789,150
8 Totals	1,160,137,877	1,895,463,887	87,407,777		3,143,010,981

SCHEDULE D — PART 6 — SECTION 1

Questionnaire Relating to the Valuation of Shares of Certain Subsidiary, Controlled or Affiliated Companies

1 Name of Subsidiary, C...olled or Affiliated Company	2 Do Insurer's Admitted Assets Include Intangible Assets Connected with Holding of Such Company's Stock?	3 If Yes, Amount of Such Intangible Assets	Common Stock of Such Company Owned by Insurer on Statement Date 4 No. of Shares	 5 % of Outstanding	6 NAIC Valuation Method
rum & Forster Insurance Co. (Bermuda) Ltd.	NO		148,110	100	4(B)(a)iii
rum & Forster Managers Corp.	NO		10	100	4(B)(a)iv
ichard Whiley, Inc.	NO		10	100	4(B)(a)iv
ndustrial Indemnity Life	NO		12,000	100	4(B)(a)iv
. W. Biegler (Florida) Inc.	YES	2,725,416	1,000	100	4(B)(a)iv
eaboard Underwriters, Inc.	NO		1,000	100	4(B)(a)iv
iking Agency	NO		1,000	100	4(B)(a)iv
AVCO Corp.	NO		1,000	100	4(B)(a)iv
erox Financial Services Life Insurance Company	NO		800,000	100	4(B)(a)iv
	TOTAL	2,725,416	XXX	XXX	XXX

t of Insurer's Capital and Surplus (Page 3, Item 27 of previous year's statement filed by the insurer with its domiciliary insurance department) $ 668,943,619

SCHEDULE D — PART 6 — SECTION 2

1 Name of Lower-tier Company	2 Name of Company Listed in Section 1 which controls Lower-tier Company	3 Amount of Intangible Assets Included in Amount Shown in Column 3, Section 1	Common Stock of Lower-tier Company Owned Indirectly by Insurer on Statement Date 4 No. of Shares	 5 % of Outstanding
	NONE			
	TOTAL		XXX	XXX

SCHEDULE F — PART 1A — SECTION 1

Ceded Reinsurance as of December 31, Current Year

Name of Reinsurer*	NAIC Company Code	Location**	1 Reinsurance Recoverable on Paid Losses	2 Reinsurance Recoverable on Unpaid Losses	3 Premiums in Force	4 Unearned Premiums (Estimated)
[illegible]						
[illegible] Affiliates						
[illegible] Affiliates						
-Affiliates Authorized			113,600,896	664,277,901	701,355,791	394,711,360
uthorized "A" Companies			1,362,752	21,673,540	18,278,914	9,515,280
uthorized "B" Companies			29,051,990	336,735,550	217,213,847	99,078,136
al in Non-Licensed Companies			30,414,742	358,409,090	235,492,761	108,593,416
s Non affiliates			144,015,638	1,022,686,991	936,848,552	503,304,776
nd Totals			144,015,638	1,022,686,991	936,848,552	503,304,776

mpanies should be listed in straight alphabetical order

he precise location of the reinsurance company

SCHEDULE F — PART 1A — SECTION 2

Assumed Reinsurance as of December 31, Current Year (to be filed not later than April 1)

Name of Reinsured*	NAIC Company Code	Location**	1 Reinsurance Payable on Paid Losses	2 Reinsurance Payable on Unpaid Losses	3 Unearned Premiums (Estimated)
Affiliates					
Totals-Affiliates					
Non-affiliates			7,200,855	328,598,706	137,372,103
Totals-Non-affiliates			7,200,855	328,598,706	137,372,103
Grand Totals			7,200,855	328,598,706	137,372,103

*All companies should be listed in straight alphabetical order

**Show the precise location of the reinsured company

SCHEDULE F — PART 1B

Portfolio Reinsurance Effected or Cancelled (–) during Current Year

Name of Company	NAIC Company Code	1 Date of Contract	2 Amount of Original Premiums	3 Amount of Reinsurance Premiums
(a) Reinsurance Ceded				
Total Reinsurance Ceded by Portfolio	XXX	XXX	14,511,902	7,637,843
(b) Reinsurance Assumed				
Total Reinsurance Assumed by Portfolio	XXX	XXX	(-) 1,152,899	(-) 423,497

SCHEDULE F — PART 2

Funds Withheld on Account of Reinsurance in Unauthorized Companies as of December 31, Current Year

Name of Reinsurer	NAIC Company Code	1 Unearned Premiums (Debit)	2 (a) Paid and Unpaid Losses Recoverable (Total of amounts in Cols. 1 + 2 of Schedule F Part 1A Section I for unauthorized companies) (Debit)	2 (b) Incurred But Not Reported Losses Recoverable (Estimates of amounts recoverable from unauthorized companies) (Debit)	2 (c) Paid and Unpaid Allocated Loss Adjustment Expenses Recoverable (Debit)	3 Total 1 + 2a + 2b + 2c	4 Deposits by and Funds Withheld from Reinsurers (Credit)	5 Miscellaneous Balances (Credit)	6 Sum of 4 + 5 but not in excess of 3
							86,084,451 * 413,084,810		
TOTALS	XXX	108,593,416	388,823,832	71,137,755	8,664,030	577,219,033	499,169,261	161,077,475	547,810,337

NOTES: Total of Column 6 to agree with deduction taken in item 16d Page 3
Securities held on deposit or held in a trust account should be valued at their fair market value
NAIC published market values must be used when available
Amounts included in Column 4 should be identified separately as letters of credit (L), trust agreements (T), funds deposited by and withheld from reinsurer (F), or other (O)
Letters of credit and trust agreements are not to be included in assets or liabilities on Pages 2 or 3 or supporting pages or exhibits

SCHEDULE G

(000's omitted)

Showing Net Losses Paid on Fidelity and Surety claims that were undisposed of December 31st of the following years as compared with Estimated Liability per Annual statements of the respective years and at end of Current Year

1		2	3	4	5	6	7
Net Losses Unpaid December 31st per Annual Statement for Each of the Following Years			Total Amount Paid to Date Since December 31 of Year in Column 1	Estimated Liability December 31st Current Year	Total 3 + 4	Increase or (−) Decrease Estimated Liability 5 − 2	Total Salvage Net of Salvage Expense Collected to Date Since December 31 of Year in Column 1
1978	Fidelity	5,979	4,400	30	4,430	(−) 1,549	51
	Surety	6,161	6,680	187	6,867	706	27
1979	Fidelity	8,160	4,767	39	4,806	(−) 3,354	284
	Surety	4,622	8,904	233	9,137	4,515	615
1980	Fidelity	7,735	5,113	96	5,209	(−) 2,526	390
	Surety	5,781	8,948	365	9,313	3,532	1,183
1981	Fidelity	9,201	6,800	267	7,067	(−) 2,134	707
	Surety	4,525	3,338	711	4,049	(−) 476	90
1982	Fidelity	13,628	10,473	411	10,884	(−) 2,744	738
	Surety	4,728	6,865	1,361	8,226	3,498	1,260
1983	Fidelity	13,635	11,422	902	12,324	(−) 1,311	525
	Surety	5,133	11,916	2,103	14,019	8,886	2,525
1984	Fidelity	19,095	7,227	1,996	9,223	(−) 9,872	419
	Surety	10,222	12,644	30,109	42,753	32,531	1,041

SCHEDULE K

Computation of Excess of Statutory Reserve over Statement Reserves — Credit

1 Net unpaid losses on policies expired prior to October 1, current year	NONE
2 Reserve for losses on policies expired in October, November and December, current year:	
(a) Net premiums written on such policies	
(b) 50% of (a)	
(c) Net losses paid under such policies	
(d) Difference (b) − (c)	
(e) Net losses unpaid under such policies	
(f) Difference (d) − (e), show zero if negative	
3 Reserve for accrued losses on policies in force December 31, current year:	
(a) Net premiums earned under such policies	
(b) 50% of (a)	
(c) Net losses paid under such policies	
(d) Difference (b) − (c)	
(e) Net losses unpaid under such policies	
(f) Difference (d) − (e), show zero if negative	
4 Excess of Statutory Reserve over Statement Reserves 2(f) + 3(f)	

Note: Sum of 1 + 2(e) + 3(e) should equal Page 10, Column 5, Item 28.

SCHEDULE H—ACCIDENT AND HEALTH EXHIBIT

	1 Total		2 Group Accident and Health		3 Credit (a) (Group and Individual)		4 Collectively Renewable		Other Individual Policies 5 Non-Cancellable		6 Guaranteed Renewable		7 Non-Renewable for Stated Reasons Only		8 Other Accident Only		9 All Other	
	Amount	%†	Amount	%†	Amount	%†	Amount	%†	Amount	%†	Amount	%†	Amount	%†	Amount	%†	Amount	%†
PART 1.—ANALYSIS OF UNDERWRITING OPERATIONS																		
1 Premiums written	10,485,632		5,496,802								10,963				(137,144)		5,115,011	
2 Premiums earned (see note b)	10,983,422		5,497,937								10,739				(223,450)		5,698,196	
3 Incurred claims	6,705,104	61.1	3,380,017	61.5							29,159	271.5			(311,105)	139.2	3,607,033	63.3
4 Increase in policy reserves	0		0								0				0		0	
5 Commissions*	1,916,973	17.5	700,214	12.7							1,885	17.6			(136,161)	60.9	1,351,035	23.7
6 General insurance expenses	1,597,000	14.5	1,423,000	25.9							365	3.4			0		173,635	3.0
7 Taxes, licenses and fees	97,000	0.9	54,000	1.0							90	0.8			0		42,910	0.8
8 Total expenses incurred	3,610,973	32.9	2,177,214	39.6							2,340	21.8			(136,161)	60.9	1,567,580	27.5
9 Gain from underwriting before dividends to policyholders	667,345	6.1	(59,294)	-1.1							(20,760)	-193.3			223,816	100.2	523,583	9.2
10 Dividends to policyholders	0		0								0				0		0	
11 Gain from underwriting after dividends to policyholders	667,345	6.1	(59,294)	-1.1							(20,760)	-193.3			223,816	100.2	523,583	9.2
PART 2.—RESERVES AND LIABILITIES																		
A Premium Reserves																		
1 Unearned premiums	(153,089)		139,473								2,154				144,407		(439,123)	
2 Advance premiums	0		0								0				0		0	
3 Reserve for rate credits	0		0								0				0		0	
4 Total premium reserves, current year	(153,089)		139,473								2,154				144,407		(439,123)	
5 Total premium reserves, previous year	404,701		140,608								2,330				58,101		203,662	
6 Increase in total premium reserves	(557,790)		(1,135)								(176)				86,306		(642,785)	
B Policy Reserves																		
1 Additional reserves	0		0								0				0		0	
2 Reserve for future contingent benefits (deferred maternity and other similar benefits)**	0		0								0				0		0	
3 Total policy reserves, current year	0		0								0				0		0	
4 Total policy reserves, previous year	0		0								0				0		0	
5 Increase in policy reserves	0		0								0				0		0	
C Claim Reserves and Liabilities																		
1 Total current year	3,541,584		1,880,135								16,449				(17,889)		1,662,889	
2 Total previous year	4,216,664		1,932,079								11,634				35,095		2,237,856	
3 Increase	(675,080)		(51,944)								4,815				(52,984)		(574,967)	
PART 3.—TEST OF PREVIOUS YEAR'S CLAIM RESERVES AND LIABILITIES																		
1 Claims paid during the year																		
a On claims incurred prior to current year	4,238,128		1,339,154								12,580				21,376		2,865,018	
b On claims incurred during current year	3,148,096		2,153,407								11,884				(288,559)		1,271,364	
2 Claim reserves and liabilities December 31 current year																		
a On claims incurred prior to current year	750,209		173,526								4,405				40,473		531,805	
b On claims incurred during current year	2,791,375		1,706,609								12,044				(58,362)		1,131,084	
3 Test																		
a Lines 1a and 2a	4,988,337		1,512,680								16,985				61,849		3,396,823	
b Claim reserves and liabilities December 31 previous year	4,216,664		1,932,079								11,634				35,095		2,237,856	
c Line a minus Line b	771,673		(419,399)								5,351				26,754		1,158,967	
PART 4.—REINSURANCE																		
A Reinsurance Assumed																		
1 Premiums written	673,890		573,735								0				100,155		0	
2 Premiums earned (see note b)	652,476		552,306								0				100,170		0	
3 Incurred claims	505,174		279,974								0				225,200		0	
4 Commissions	298,716		264,103								0				34,613		0	
B Reinsurance Ceded																		
1 Premiums written	3,258,481		998,598								0				578,861		1,681,022	
2 Premiums earned (see note b)	3,262,305		981,319								0				577,978		1,703,008	
3 Incurred claims	1,980,657		406,497								0				664,414		909,746	
4 Commissions	963,179		330,966								0				200,347		431,866	

a Business not exceeding 120 months duration

† In each column of Part 1 show the percentages of Line 2 for Lines 3 through 11 inclusive

* Includes $ 0 reported as "Policy, membership and other fees retained by agents."

** If not included in claim reserves.

(b) Premiums earned are before adjustment for the increase in policy reserves which has been treated as a separate deduction

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

SCHEDULE O - PART 1 - LOSS DEVELOPMENT
(000 omitted)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)
	Losses paid during the year less reinsurance received during the year(a)			Salvage and subrogation received in the current year			Total (Col.2+3+4 -5-6-7) net disbursements per Col.4 Part 3	Losses paid during 1984 on losses incurred prior to 1984, (Col. 3 + 4, Sch.O, 1984)	Losses unpaid December 31 of current year				Development		Estimated liability on unpaid losses		Changes in such estimated liability	
	On losses incurred during 1985	On losses incurred during 1984	On losses incurred prior to 1984	On losses incurred during 1985	On losses incurred during 1984	On losses incurred prior to 1984			On losses incurred during 1985	On losses incurred during 1984	On losses incurred prior to 1984	Total per Col.5, Part 3A (Col. 10 + 11+12)	On losses incurred prior to 1985 (Col.3 +4+11+12)	On losses incurred prior to 1984 (Col.4 +9+12)	Dec.31,1984 per Col.5, Part 3A 1984	Dec.31,1983 per Col. 5 Part 3A 1983	Dec.31, 1984 (Col. 14 less Col.16)	Dec.31, 1983 (Col. 15 less Col.17)
1. Fire	15,130	8,894	3,977	71	61	354	27,515	18,169	8,779	4,271	19,152	32,202	36,294	41,298	39,460	41,431	-3,166	-133
2. Allied Lines	7,561	9,178	906	12	91	195	17,347	16,555	9,603	1,391	1,985	12,979	13,370	19,446	7,839	15,598	5,531	3,848
9. Inland Marine	24,341	20,488	971	300	572	[illegible]	44,518	19,441	27,930	5,638	3,818	37,386	30,915	24,230	33,043	26,319	-2,128	-2,089
10.																		
12. Earthquake	13	7	9				29		33	19	13	65	48	22	44	47	4	-25
13. Group Accident and health	2,153	1,252	98			10	3,493	**|| 1,166	1,647	133	40	1,820	1,523	1,304	1,932	1,585	-409	-281
14. Credit accident and health (group and individual)**																		
15. Other accident and health	788	2,880	220				3,888	1,202	1,144	326	251	1,721	3,677	1,673	2,484	1,375	1,193	298
21. Auto phys. damage	113,147	34,138	2,276	5,231	6,343	1,575	136,412	63,238	32,154	2,544	1,322	36,020	40,280	66,836	42,306	78,040	-2,026	-11,204
23. Fidelity	-17	3,148	4,078	16	160	250	6,774	7,343	3,122	1,094	901	5,117	9,221	13,322	19,096	14,638	-9,875	-1,316
24. Surety	47,683	9,438	3,200	657	144	897	58,623	8,706	74,402	27,006	3,103	104,511	42,747	15,009	10,224	5,131	32,523	9,878
25. Glass	113	56	-6				163	61	65		9	74	59	64	82	228	-23	-164
26. Burglary and theft	279	237	90			50	556	397	139	9	67	215	403	554	416	1,081	-13	-527
28. Credit																		
29. International																		
30. Reinsurance	6,375	1,617	69				8,061	1,148	11,620	2,750	88	14,458	4,524	1,305	5,637		-1,113	1,305
31. TOTALS	217,766	91,143	15,888	6,227	7,371	3,813	307,377	117,426	170,736	46,081	29,749	246,566	182,861	183,063	163,143	164,497	19,718	-1,630

(a) Reinsurance as used in Columns 2, 3 and 4 include (1) received in cash, and (2) recoverable (charged during year of statement) if carried as a ledger asset.

**Business not exceeding 120 months duration

SCHEDULE O - PART 2 - LOSS EXPENSE DEVELOPMENT
(000 omitted)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)
	Allocated loss expense payments during the year			Unallocated loss expense payments during the year(a)			Total (Col.2+3+4 +5+6+7) net disbursements	Loss expenses paid during 1984 on losses incurred prior to 1984, (Col.3+4+6+7 Schedule O, Part 2,1984)	Unpaid loss adjustment expenses . December 31 of current year				Development		Estimated liability on unpaid loss adjustment expenses		Changes in such estimated liability	
	On losses incurred during 1985	On losses incurred during 1984	On losses incurred prior to 1984	On losses incurred during 1985	On losses incurred during 1984	On losses incurred prior to 1984			On losses incurred during 1985	On losses incurred during 1984	On losses incurred prior to 1984	Total per Col.6 Part 3A (Col.10+ 11+12)	On losses incurred prior to 1985 (Col.3 +4+6+7+11+12)	On losses incurred prior to 1984 (Col 4 +7+9+12)	Dec.31,1984 per Col.6, Part 3A 1984	Dec.31,1983 per Col.6, Part 3A 1983	Dec.31, 1984 (Col. 14 less Col.16)	Dec.31, 1983 (Col. 15 less Col.17)
1. Fire	1,070	406	630	1,074	361	120	3,661	1,683	532	254	1,201	1,987	2,972	3,634	2,114	2,220	858	1,414
2. Allied Lines	379	362	365	652	340	23	2,121	1,744	619	82	133	834	1,305	2,265	983	1,294	322	971
9. Inland Marine	505	1,076	520	1,392	553	18	4,064	1,674	3,065	612	423	4,100	3,202	2,635	3,250	2,589	-48	46
10.																		
12. Earthquake			4	5	5	4	18	4	-1	4	5	8	22	17	7	14	15	3
13. Group Accident and health	1	6	7	458	134	6	612	142	256	19	8	283	180	163	241	207	-61	-44
14. Credit accident and health (group and individual)**																		
15. Other accident and health	2	6	-6	8	8	5	23	25	139	39	29	207	81	53	97	52	-16	1
21. Auto phys. damage	4,408	2,325	401	9,194	1,862	59	18,250	4,983	2,220	154	102	2,476	4,903	5,545	6,532	7,895	-1,629	-2,350
23. Fidelity	-194	812	896	144	84	90	1,832	1,588	1,685	590	486	2,761	2,958	3,060	3,504	3,376	-546	-316
24. Surety	465	3,562	1,173	856	128	27	6,211	1,542	5,712	2,149	162	8,023	7,201	2,904	4,199	3,043	3,002	-139
25. Glass				10	5	-4	11	3	11		3	14	4	2	6	20	-2	-18
26. Burglary and theft	12	16	26	25	12	6	97	29	32	4	18	54	82	79	58	115	24	-36
28. Credit																		
29. International																		
30. Reinsurance	8	53	6	24	7		98	12	671	191	6	868	263	24	413		-150	24
31. TOTALS	6,657	8,624	4,022	13,842	3,499	354	36,998	13,429	14,941	4,098	2,576	21,615	23,173	20,381	21,404	20,825	1,769	-444

(a) See Schedule P - Part 1F footnote (g) for method of distribution

**Business not exceeding 120 months duration.

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

SCHEDULE O - PART 3 - SUMMARY - LOSS AND LOSS EXPENSE
(000 omitted)

	(1) Years In Which Premiums Were Earned and Losses Were Incurred	(2) Premium Earned	(3) Loss Payments (b)	(3a) Salvage Received (c)	(D) LOSS EXPENSE PAYMENTS (4) Allocated	(4a) Ratio 4/3 %	(5) Unallocated (g)	(5a) Ratio 5/3 %	(6) Loss and Loss Expense Payments (3 + 4 + 5)	(7) Ratio 6/2 %	(8)	(9) Losses Unpaid	(10) (d) Loss Expense Unpaid	(11) Total Losses and Loss Expense Incurred (6 + 9 + 10)	(12) Ratio 11/2 %
1	Prior to 1976	237,825	60,124	7,814	4,556	7.58	1,923	3.20	66,603	28.01	X X X	221	19	66,843	28.11
2	1976	271,737	160,494	6,350	8,664	5.40	8,424	5.25	177,582	65.35	X X X	185	18	177,785	65.43
3	1977	301,070	164,387	7,772	9,094	5.53	7,720	4.70	181,201	60.19	X X X	230	20	181,451	60.27
4	1978	327,158	198,627	10,222	10,963	5.52	9,094	4.58	218,684	66.84	X X X	284	24	218,992	66.94
5	1979	366,214	225,332	13,279	11,858	5.26	9,028	4.01	246,218	67.23	X X X	221	19	246,458	67.30
6	1980	421,651	261,743	15,751	13,959	5.33	8,802	3.36	284,504	67.47	X X X	1,120	98	285,722	67.76
7	1981	375,198	240,872	15,660	11,131	4.62	9,986	4.15	261,989	69.83	X X X	18,572	1,607	282,168	75.21
8	1982	387,867	271,433	16,222	14,400	5.31	12,514	4.61	298,347	76.92	X X X	4,208	366	302,921	78.10
9	1983	420,822	300,008	16,579	13,806	4.60	14,722	4.91	328,536	78.07	X X X	4,708	405	333,649	79.29
10	1984	459,340	307,926	15,155	16,449	5.34	17,861	5.80	342,236	74.51	X X X	46,081	4,098	392,415	85.43
11	1985	455,688	217,766	6,227	6,657	3.06	13,842	6.36	238,265	52.29	X X X	170,736	14,941	423,942	93.03
12	TOTALS	4,024,570	2,408,712	131,031	121,537	5.05	113,916	4.73	2,644,165	65.70	X X X	246,566	21,615	2,912,346	X X X

(b) Include amounts reportable in Columns 2,3, and 4 of Schedule O-Part 1 (For lines other than current year, amounts reported herein should include loss payments made in prior years as well as loss payments made in current year.)

(c) Include amounts reportable in Columns 5,6, and 7 of Schedule O-Part 1. (For lines other than current year, amounts reported herein should include salvage received in prior years as well as salvage received in current year.)

(g) The unallocated loss expense payments paid during the most recent calendar year should be distributed to the various years in which losses were incurred as follows: (1) 45% to the most recent year, (2) 5% to the next most recent year, and (3) the balance to all years, including the most recent, in proportion to the amount of loss payments paid for each year during the most recent calendar year. If the distribution in (1) or (2) produces an accumulated distribution to such year in excess of 10% of the premiums earned for such year , disregarding all distributions made under (3), such accumulated distribution should be limited to 10% of premiums earned and the balance distributed in accordance with (3). Are they so reported in this statement?
ANSWER: ____________ YES ____________

(d) The term "loss expense" includes all payments for legal expenses, including attorney's and witness fees and court costs, salaries and expenses of investigators, adjustors and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses and all other payments under or on account of such losses, whether the payments are allocated to specific claims or are unallocated. Are they so reported in this statement? ANSWER ____________ YES ____________

NOTE: See instructions.

SCHEDULE P - PART 1 - SUMMARY

1	2	3	(d) Loss Expense Payments				6	7	8	9	10	11	12
			4	4a	5	5a							
Years in Which Premiums Were Earned and Losses Were Incurred	Premiums Earned	Loss Payments	Allocated	Ratio 4/3 %	(g) Unallocated	Ratio 5/3 %	Loss and Loss Expense Payments (3+4+5)	Ratio 6/2 %	Number of Claims Outstanding	Losses Unpaid	(d) Loss Expense Unpaid	Total Losses and Loss Expense Incurred (6+9+10)	Ratio 11/2 %
1 Prior to 1976	3,868,942,553	2,457,904,464	203,768,168	8.29	269,602,601	10.97	2,931,275,233	75.76	7,997	59,285,876	9,161,156	2,999,722,265	77.53
2 1976	767,426,898	431,284,233	48,055,960	11.14	35,795,464	8.30	515,135,657	67.13	1,494	34,371,503	6,146,996	555,654,156	72.40
3 1977	945,476,592	484,747,182	53,246,534	10.98	41,645,795	8.59	579,639,511	61.31	1,771	33,321,379	5,531,503	618,492,393	65.42
4 1978	1,064,457,489	489,324,219	51,282,181	10.48	44,993,393	9.20	585,599,793	55.01	2,351	38,486,121	6,843,123	630,929,037	59.27
5 1979	1,200,539,470	580,171,454	54,828,063	9.45	51,955,788	8.96	686,955,305	57.22	3,727	57,019,727	10,028,447	754,003,479	62.81
6 1980	1,261,229,889	661,653,479	61,716,564	9.33	58,877,808	8.90	782,247,851	62.02	5,077	79,264,598	15,124,992	876,637,441	69.51
7 1981	1,282,899,384	686,187,531	60,532,450	8.82	61,489,725	8.96	808,209,706	63.00	7,603	139,929,768	27,917,475	976,056,949	76.08
8 1982	1,326,328,093	741,421,538	61,599,678	8.31	61,093,424	8.24	864,114,640	65.15	12,500	187,761,217	37,269,089	1,089,144,946	82.12
9 1983	1,430,652,832	773,496,807	55,032,347	7.11	64,321,292	8.32	892,850,446	62.41	22,511	310,404,133	61,335,661	1,264,590,240	88.39
10 1984	1,624,984,523	751,977,456	43,469,966	5.78	82,688,341	11.00	878,135,763	54.04	48,152	594,514,108	115,904,124	1,588,553,995	97.76
11 1985	1,729,488,686	298,959,823	-4,958,929	-1.66	31,897,506	10.67	325,898,400	18.84	89,601	1,243,934,030	248,008,045	1,817,840,475	105.11
12 TOTALS	16,502,426,609	8,357,128,186	688,572,982	8.24	804,361,137	9.62	9,850,062,305	59.69	202,784	2,778,292,460	543,270,611	13,171,625,376	79.82

SCHEDULE P - PART 1A - AUTO LIABILITY+

1	2	3	4	4a	5	5a	6	7	8	9	10	11	12
1 Prior to 1976	920,877,604	555,451,314	45,241,418	8.14	83,536,330	15.04	684,229,062	74.30	122	617,745	95,042	684,941,849	74.38
2 1976	146,352,729	96,868,211	7,600,050	7.85	9,059,569	9.35	113,527,830	77.57	43	594,672	110,066	114,232,568	78.05
3 1977	172,706,869	108,222,426	8,727,869	8.06	9,848,414	9.10	126,798,709	73.42	83	401,417	73,339	127,273,465	73.69
4 1978	187,644,767	114,675,377	9,079,724	7.92	8,474,789	7.39	132,229,890	70.47	111	664,641	105,767	133,000,298	70.88
5 1979	214,518,874	139,669,791	10,640,218	7.62	9,358,368	6.70	159,668,377	74.43	187	1,925,735	324,667	161,918,779	75.48
6 1980	235,589,255	154,983,493	10,691,014	6.90	9,776,090	6.31	175,450,597	74.47	312	3,766,004	661,788	179,878,389	76.35
7 1981	244,095,181	167,381,103	11,536,335	6.89	10,687,322	6.39	189,604,760	77.68	630	8,186,002	1,481,541	199,272,303	81.64
8 1982	275,624,099	190,969,889	12,407,203	6.50	11,405,330	5.97	214,782,422	77.93	1,228	18,608,237	3,401,766	236,792,425	85.91
9 1983	303,415,286	209,277,280	11,907,866	5.69	11,989,951	5.73	233,175,097	76.85	2,625	36,068,087	6,713,408	275,956,592	90.95
10 1984	321,771,369	180,868,589	10,157,747	5.62	14,891,045	8.23	205,917,381	63.99	7,083	88,398,740	15,781,672	310,097,793	96.37
11 1985	301,930,192	78,303,831	5,304,664	6.77	9,905,773	12.65	93,514,268	30.97	17,816	154,205,415	28,685,638	276,405,321	91.55
12 TOTALS	3,324,526,225	1,996,671,304	143,294,108	7.18	188,932,981	9.46	2,328,898,393	70.05	30,240	313,436,695	57,434,694	2,699,769,782	81.21

COMPUTATION OF EXCESS OF STATUTORY RESERVE OVER STATEMENT RESERVES - AUTO LIABILITY

1985 $____0____ 1984 $____0____ 1983 $____0____ Total $____0____ Calculation Method ___70.9___% of column 2, less column 11, if negative enter zero. See note a.

SCHEDULE P - PART 1B - OTHER LIABILITY+

1	2	3	4	4a	5	5a	6	7	8	9	10	11	12
1 Prior to 1976	481,019,071	276,120,401	63,689,546	23.07	38,177,701	13.83	377,987,648	78.58	1,498	12,035,168	2,186,037	392,208,853	81.54
2 1976	150,124,416	63,944,106	17,518,101	27.40	3,839,067	6.00	85,301,274	56.82	381	12,049,017	2,332,707	99,682,998	66.40
3 1977	211,967,480	73,681,137	21,401,975	29.05	5,400,642	7.33	100,483,754	47.41	569	13,193,076	2,346,812	116,023,642	54.74
4 1978	269,081,405	84,897,201	19,727,787	23.24	5,508,871	6.49	110,133,859	40.93	789	18,208,027	3,380,777	131,722,663	48.95
5 1979	289,312,924	93,640,728	18,561,732	19.82	6,819,092	7.28	119,021,552	41.14	1,186	22,631,202	4,319,762	145,972,516	50.45
6 1980	274,916,939	104,265,918	22,324,661	21.41	9,706,490	9.31	136,297,069	49.58	1,429	32,460,466	6,344,014	175,101,549	63.69
7 1981	252,448,036	88,644,919	19,760,927	22.28	9,207,998	10.39	117,613,844	46.59	2,091	65,682,789	13,006,645	196,303,278	77.76
8 1982	232,297,964	94,075,030	20,950,475	22.27	13,115,190	13.94	128,140,695	55.16	3,338	84,425,129	16,885,789	229,451,613	98.77
9 1983	228,557,605	74,331,831	16,611,008	22.35	13,851,278	18.63	104,794,117	45.85	5,231	123,596,240	24,636,190	253,026,547	110.71
10 1984	288,017,993	52,322,511	10,970,575	20.97	12,987,200	24.82	76,280,286	26.48	6,922	205,771,376	40,789,425	322,841,087	112.09
11 1985	447,536,744	7,848,529	-13,096,720	-166.87	-20,467,070	-260.78	-25,715,261	-5.75	7,667	493,604,659	98,201,589	566,090,987	126.49
12 TOTALS	3,125,280,579	1,013,772,311	218,420,067	21.55	98,146,450	9.68	1,330,338,837	42.57	33,021	1,083,657,149	214,429,747	2,628,425,733	84.10

COMPUTATION OF EXCESS OF STATUTORY RESERVE OVER STATEMENT RESERVES - OTHER LIABILITY

1985 $____0____ 1984 $____0____ 1983 $____0____ Total $____0____ 'Calculation Method ____60.0___% of column 2, less column 11, if negative enter zero. See Note a.

See Schedule - P 1f for footnotes.

(3 .8) $5,091 9,362

SCHEDULE P - PART 1C - MEDICAL MALPRACTICE

	1	2	3	4	4a	5	5a	6	7	8	9	10	11	12
				(d) Loss Expense Payments										
	Years in Which Premiums Were Earned and Losses Were Incurred	Premiums Earned	Loss Payments	Allocated	Ratio 4/3 %	(g) Unallocated	Ratio 5/3 %	Loss and Loss Expense Payments (3+4+5)	Ratio 6/2 %	Number of Claims Outstanding	Losses Unpaid	(d) Loss Expense Unpaid	Total Losses and Loss Expense Incurred (6+9+10)	Ratio 11/2 %
1	Prior to 1976	6,734,560	9,530,187	638,160	6.70	213,635	2.24	10,381,982	154.16	33	721,637	132,556	11,236,175	166.84
2	1976	20,625,360	6,597,795	947,740	14.36	287,003	4.35	7,832,538	37.98	17	4,315,653	840,346	12,987,487	63.02
3	1977	14,685,831	2,981,348	526,750	17.67	191,454	6.42	3,699,552	25.19	25	890,780	188,622	4,778,954	32.54
4	1978	12,668,609	2,700,995	250,472	9.27	518,240	19.19	3,469,707	27.39	34	726,895	145,854	4,342,456	34.28
5	1979	8,928,011	1,713,627	580,812	33.89	119,643	6.98	2,414,082	27.04	101	1,698,129	301,275	4,413,486	49.43
6	1980	6,994,531	4,124,180	509,280	12.35	129,040	3.13	4,762,500	68.09	146	3,245,124	490,368	8,497,992	121.49
7	1981	5,900,514	3,376,525	261,707	7.75	14,048	.42	3,652,280	61.90	81	2,313,829	427,115	6,393,224	108.35
8	1982	7,891,743	1,736,312	285,110	16.42	152,640	8.79	2,174,062	27.57	91	3,534,336	609,436	6,317,834	80.06
9	1983	4,524,045	1,230,939	352,860	28.66	156,471	12.71	1,740,270	38.47	81	1,641,507	305,373	3,687,150	81.50
10	1984	3,563,584	259,118	48,257	18.62	119,077	45.95	426,452	11.97	103	1,732,546	269,945	2,428,943	68.16
11	1985	5,124,227	-3,592	-153,307	4268.01	110,040	-3063.47	-46,859	-.91	51	5,077,323	1,805,587	6,836,051	133.41
12	TOTALS	97,641,031	34,247,434	4,247,789	12.40	2,011,291	5.87	40,506,464	41.49	762	26,785,759	4,715,460	71,928,683	73.67

COMPUTATION OF EXCESS OF STATUTORY RESERVE OVER STATEMENT RESERVES - MEDICAL MALPRACTICE

1985 $____0____ 1984 $____0____ 1983 $____0____ Total $____0____ Calculation Method ____60.0____% of column 2, less column 11, if negative enter zero. See Note a.

SCHEDULE P - PART 1D - WORKER'S COMPENSATION

	1	2	3	4	4a	5	5a	6	7	8	9	10	11	12
1	Prior to 1976	1,968,703,734	1,264,404,040	63,997,983	5.06	126,298,030	9.99	1,454,700,081	73.89	6,214	44,884,839	6,403,383	1,505,988,323	76.49
2	1976	243,276,734	145,556,214	8,762,600	6.02	15,099,136	10.37	169,417,950	69.64	993	15,511,812	2,224,190	187,153,970	76.93
3	1977	296,336,400	172,067,050	8,587,102	4.99	17,496,294	10.17	198,150,446	66.87	1,017	17,643,441	2,552,790	218,346,677	73.68
4	1978	311,679,324	151,529,733	9,489,601	6.26	20,306,399	13.40	181,325,733	58.18	1,205	16,120,747	2,315,246	199,761,726	64.09
5	1979	375,948,877	180,377,481	9,171,411	5.08	24,994,525	13.86	214,543,417	57.07	3,070	27,005,507	3,873,359	245,422,283	65.28
6	1980	412,620,520	210,862,374	10,207,146	4.84	27,938,501	13.25	249,008,021	60.35	3,664	29,371,346	4,213,770	282,593,137	68.49
7	1981	435,207,106	215,038,070	9,564,235	4.45	29,041,851	13.51	253,644,156	58.28	3,954	43,218,280	6,194,393	303,056,830	69.64
8	1982	445,830,170	214,656,083	7,973,787	3.71	26,423,308	12.31	249,053,178	55.86	6,112	55,405,304	7,952,282	312,410,764	70.07
9	1983	487,885,403	237,796,935	8,039,176	3.38	26,442,070	11.12	272,278,181	55.81	11,219	104,321,668	14,981,096	391,580,945	80.26
10	1984	546,425,195	251,650,061	6,262,608	2.49	36,510,448	14.51	294,423,117	53.88	26,378	207,533,363	29,814,182	531,770,662	97.32
11	1985	496,944,708	73,485,617	-221,293	-.30	27,843,604	37.89	101,107,928	20.35	47,000	390,044,712	56,058,200	547,210,840	110.12
12	TOTALS	6,020,056,419	3,117,423,406	141,834,467	4.55	378,394,254	12.14	3,637,652,217	60.42	106,906	958,981,026	136,582,820	4,733,216,065	78.62

COMPUTATION OF EXCESS OF STATUTORY RESERVE OVER STATEMENT RESERVES - WORKER'S COMPENSATION

1985 $____0____ 1984 $____0____ 1983 $____0____ Total $____0____ Calculation Method ____65.0____% of Column 2, less Column 11, if negative enter zero. See Note a.

SCHEDULE P - PART 1E - FARMOWNERS MULTIPLE PERIL, HOMEOWNERS MULTIPLE PERIL, COMMERCIAL MULTIPLE PERIL, OCEAN MARINE, AIRCRAFT (ALL PERILS) AND BOILER AND MACHINERY

	1	2	3	4	4a	5	5a	6	7	8	9	10	11	12
1	Prior to 1976	491,607,576	352,398,514	30,201,040	8.57	21,376,897	6.07	403,976,451	82.17	130	1,106,407	344,218	405,427,076	82.47
2	1976	207,047,651	118,317,947	13,227,460	11.18	7,510,680	6.35	139,056,096	67.16	60	1,900,340	630,670	141,587,123	68.38
3	1977	249,779,924	127,795,229	14,002,830	10.96	8,708,991	6.81	150,507,050	60.26	77	1,184,665	377,940	152,069,655	60.88
4	1978	283,383,384	135,520,913	12,734,507	9.40	10,185,184	7.52	158,440,604	55.91	132	2,765,811	895,479	162,101,894	57.20
5	1979	311,830,784	164,769,827	15,873,890	9.63	10,664,160	6.47	191,307,877	61.35	283	3,756,154	1,289,384	196,374,415	62.94
6	1980	331,108,636	187,417,586	17,984,463	9.60	11,327,597	6.04	216,729,656	65.46	537	10,421,638	3,415,060	230,566,374	69.63
7	1981	345,240,547	211,746,914	19,409,246	9.17	12,538,506	5.92	243,694,666	70.58	847	20,528,850	6,807,781	271,031,306	78.50
8	1982	364,664,115	239,902,304	19,983,103	8.33	9,996,076	4.17	269,962,283	74.03	1,731	25,788,211	8,421,816	304,172,310	83.41
9	1983	406,270,413	250,850,832	18,121,497	7.22	11,881,522	4.74	280,862,851	69.13	3,386	44,776,631	14,699,594	340,339,076	83.77
10	1984	465,206,382	266,877,177	16,030,779	6.01	18,180,571	6.81	301,088,527	64.72	7,6[illegible]	91,070,083	29,248,900	421,415,510	90.59
11	1985	477,952,743	139,325,430	3,207,727	2.30	14,505,150	10.41	157,038,324	32.86	16,97[illegible]	200,201,921	64,057,031	421,297,276	88.15
12	TOTALS	3,934,120,155	2,195,011,601	180,776,551	8.24	136,876,152	6.24	2,512,664,304	63.87	31,765	403,511,829	139,107,881	3,046,284,104	77.43

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

SCHEDULE P - PART 1F - INCURRED BUT NOT REPORTED LOSSES

	1 Years in Which Losses Were Incurred	(h) Incurred But Not Reported Losses Unpaid Included in Column 9 of:					(i) One Year Development of IBNR Losses Included in Columns 3 and 9 of:				
		2 Part 1A	3 Part 1B	4 Part 1C	5 Part 1D	6 Part 1E	7 Part 1A	8 Part 1B	9 Part 1C	10 Part 1D	11 Part 1E
1	Prior to 1976	60	66,039	5,002	600	783					
2	1976	108,190	1,272,452	703,005	50,000	1,070,290		121,823			57
3	1977	18	1,087,554	272,317			10	1,277,691			
4	1978	160	5,051,572	263,773			4,721	476,653			
5	1979	5,592	8,023,671	200,307	445,000	43,343	52,707	563,849			-453
6	1980	113,093	11,802,122	331,727	1,771,493	317,223	554,383	5,131,551	1,433,000	4,061,299	1,443,790
7	1981	421,357	26,585,773	152,885	3,355,657	4,116,840	2,167,256	4,725,700	1,071,000	2,510,120	731,224
8	1982	1,327,050	24,723,526	830,405	6,053,500	2,750,802	1,620,375	14,663,361	897,820	5,465,663	2,050,200
9	1983	4,545,810	47,090,089	503,082	10,841,970	7,132,418	7,770,676	24,759,841	816,851	14,645,443	1,675,520
10	1984	10,617,965	110,709,316	874,344	23,846,435	20,936,011	46,247,611	61,091,015	292,805	80,941,024	68,110,213
11	1985	67,960,255	431,287,265	5,444,036	160,258,180	112,616,890					
12	TOTALS	85,100,344	660,187,379	9,602,883	215,423,833	140,993,117	58,417,705	112,811,404	4,511,586	117,424,340	66,413,530

Footnotes:

(a) The percentage to be used is based on the company's actual loss ratios in the five years immediately prior to the most recent three, provided that at least three of the five years have at least $1 million in Column 2. Use the lowest ratio in Column 12 for these years using only years which have at least $1 million in Column 2. If the lowest qualifying ratio is less than 60% then use 60%(65% for Workers Compensation). If the lowest qualifying ratio is more than 75%, then use 75%. If at least three of the five years do not have at least $1 million in Column 2, use 60% (65% for Workers' Compensation). Round percentage to nearest tenth of one percent. Indicate percentage used.

(d) The term "loss expense" includes all payments for legal expenses, including attorney's and witness fees and court costs, salaries and expenses of investigators, adjustors and field men, rents, stationery, telegraph, and telephone charges, postage, salaries and expenses of office employees, home office expenses and all other under or on account of such injuries, whether the payments are allocated to specific claims or are unallocated. Are they so reported in this statement?
Answer: ____________YES________________

(f) State maximum rate of interest used in determining present values of future workmen's compensation payments (Part 1D)___5____% and which of Parts 1A, 1B, 1C and 1E, if any, include reserves for unpaid losses that are gross (before) discount for the present value of future payments where the reserves for those losses are carried net of (after) such discount in the liabilities shown on page 10.
Answer.__________NONE__________________

(g) The unallocated loss expense payments paid during the most recent calendar year should be distributed to the various years in which losses were incurred as follows:
(1) 65% to the most recent year, (2) 5% to the next most recent year, and (3) the balance of all years, including the most recent, in proportion to the amount of loss payments paid for each year during the most recent calendar year. If distribution in (1) or (2) produces an accumulated distribution to such year in excess of 10% of the premiums earned for such year, disregarding all distributions made under (3), such accumulated distribution should be limited to 10% of premiums earned and the balance distributed in accordance with (3). Are they so reported in this Statement? Answer ______YES______

(h) Totals on Line 12 to agree with reserve shown on Page 10, Columns 4a+4b-4c of this statement. The IBNR reserve estimates in Column 2 through 6 should be sufficient to cover claims which may be reopened in future periods.

(i) Include payments and reserves to losses incurred more than one year prior to the date of this statement and reported during the current year.

*Includes only Bodily Injury Liability prior to 1971.

NOTE: See Instructions.

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

	INCURRED LOSSES AND LOSS EXPENSE REPORTED AT END OF YEAR (000 OMITTED)						INCURRED LOSS AND LOSS EXPENSE RATIO REPORTED					
(1) ears in Which ses Were Incurred	(2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	(8) 1980	(9) 1981	(10) 1982	(11) 1983	(12) 1984	(13) 1985
SCHEDULE P - PART 2 - SUMMARY												
Prior to 1980	5,703,303	5,595,352	5,566,513	5,604,022	5,579,366	5,558,801	X X X	X X X	X X X	X X X	X X X	X X X
1980	922,268	887,705	942,455	884,632	898,198	876,637	73.12	70.36	74.73	70.14	71.22	69.51
Cumulative Total	6,625,571	6,483,057	6,508,968	6,488,654	6,477,564	6,435,438	X X X	X X X	X X X	X X X	X X X	X X X
1981	X X X	1,078,365	1,041,275	971,864	992,712	976,057	X X X	84.06	81.17	75.76	77.38	76.08
Cumulative Total	X X X	7,561,422	7,550,243	7,460,518	7,470,276	7,411,495	X X X	X X X	X X X	X X X	X X X	X X X
1982	X X X	X X X	1,063,505	1,126,831	1,074,289	1,089,145	X X X	X X X	80.10	84.96	81.08	82.12
Cumulative Total	X X X	X X X	8,613,748	8,587,349	8,544,565	8,500,640	X X X	X X X	X X X	X X X	X X X	X X X
1983	X X X	X X X	X X X	1,160,514	1,248,631	1,264,590	X X X	X X X	X X X	81.12	87.28	88.39
Cumulative Total	X X X	X X X	X X X	9,747,863	9,793,196	9,765,230	X X X	X X X	X X X	X X X	X X X	X X X
1984	X X X	X X X	X X X	X X X	1,492,498	1,588,554	X X X	X X X	X X X	X X X	91.05	97.76
Cumulative Total	X X X	X X X	X X X	X X X	11,285,694	11,353,784	X X X	X X X	X X X	X X X	X X X	X X X
1985	X X X	X X X	X X X	X X X	X X X	1,817,040	X X X	X X X	X X X	X X X	X X X	105.11
SCHEDULE P - PART 2A - AUTO LIABILITY												
Prior to 1980	1,210,972	1,212,762	1,216,388	1,221,985	1,220,829	1,221,367	X X X	X X X	X X X	X X X	X X X	X X X
1980	176,628	172,777	179,767	178,800	180,641	179,878	74.97	73.34	76.30	75.80	76.68	76.35
Cumulative Total	1,387,600	1,385,539	1,396,155	1,400,785	1,401,470	1,401,245	X X X	X X X	X X X	X X X	X X X	X X X
1981	X X X	191,374	194,349	199,506	201,104	199,272	X X X	78.40	79.62	81.73	82.39	81.64
Cumulative Total	X X X	1,576,913	1,590,504	1,600,291	1,602,574	1,600,517	X X X	X X X	X X X	X X X	X X X	X X X
1982	X X X	X X X	235,956	226,943	235,725	236,792	X X X	X X X	85.61	82.34	85.52	85.98
mulative Total	X X X	X X X	1,826,460	1,827,234	1,838,299	1,837,309	X X X	X X X	X X X	X X X	X X X	X X X
1983	X X X	X X X	X X X	264,295	276,798	275,957	X X X	X X X	X X X	87.11	91.23	90.95
mulative Total	X X X	X X X	X X X	2,091,529	2,115,097	2,113,266	X X X	X X X	X X X	X X X	X X X	X X X
1984	X X X	X X X	X X X	X X X	293,401	310,098	X X X	X X X	X X X	X X X	91.18	96.37
mulative Total	X X X	X X X	X X X	X X X	2,408,498	2,423,364	X X X	X X X	X X X	X X X	X X X	X X X
1985	X X X	X X X	X X X	X X X	X X X	276,405	X X X	X X X	X X X	X X X	X X X	91.55
SCHEDULE P - PART 2B - OTHER LIABILITY												
rior to 1980	985,832	947,065	921,879	919,124	892,210	885,611	X X X	X X X	X X X	X X X	X X X	X X X
1980	193,291	193,946	223,511	192,079	191,193	175,102	70.31	70.55	81.30	69.87	69.55	63.69
umulative Total	1,179,123	1,141,011	1,145,390	1,111,203	1,083,403	1,060,713	X X X	X X X	X X X	X X X	X X X	X X X
1981	X X X	228,384	205,071	205,105	207,046	196,303	X X X	90.47	81.23	81.25	82.02	77.76
umulative Total	X X X	1,369,395	1,350,461	1,316,308	1,290,449	1,257,016	X X X	X X X	X X X	X X X	X X X	X X X
1982	X X X	X X X	188,595	187,697	214,156	229,452	X X X	X X X	81.19	80.80	92.19	98.77
umulative Total	X X X	X X X	1,539,056	1,504,005	1,504,605	1,486,468	X X X	X X X	X X X	X X X	X X X	X X X
1983	X X X	X X X	X X X	200,459	222,222	253,027	X X X	X X X	X X X	87.71	97.23	110.71
mulative Total	X X X	X X X	X X X	1,704,464	1,726,827	1,739,495	X X X	X X X	X X X	X X X	X X X	X X X
1984	X X X	X X X	X X X	X X X	267,738	322,841	X X X	X X X	X X X	X X X	92.96	112.09
mulative Total	X X X	X X X	X X X	X X X	1,994,565	2,062,336	X X X	X X X	X X X	X X X	X X X	X X X
1985	X X X	X X X	X X X	X X X	X X X	566,091	X X X	X X X	X X X	X X X	X X X	126.49
SCHEDULE P - PART 2C - MEDICAL MALPRACTICE												
ior to 1980	39,470	37,892	39,930	40,463	42,213	37,769	X X X	X X X	X X X	X X X	X X X	X X X
1980	5,290	6,932	7,590	6,480	7,891	8,498	75.63	99.11	108.52	92.46	112.82	121.49
mulative Total	44,760	44,824	47,520	46,943	50,104	46,267	X X X	X X X	X X X	X X X	X X X	X X X
1981	X X X	8,356	7,445	7,303	7,138	6,393	X X X	141.61	126.17	123.77	120.98	108.35
mulative Total	X X X	53,180	54,965	54,246	57,242	52,660	X X X	X X X	X X X	X X X	X X X	X X X
1982	X X X	X X X	7,783	5,932	4,960	6,318	X X X	X X X	90.63	75.17	62.05	80.07
mulative Total	X X X	X X X	62,748	60,178	62,202	58,978	X X X	X X X	X X X	X X X	X X X	X X X
1983	X X X	X X X	X X X	4,517	3,666	3,687	X X X	X X X	X X X	99.83	81.02	81.50
mulative Total	X X X	X X X	X X X	64,695	65,868	62,665	X X X	X X X	X X X	X X X	X X X	X X X
1984	X X X	X X X	X X X	X X X	1,602	2,429	X X X	X X X	X X X	X X X	64.98	68.16
mulative Total	X X X	X X X	X X X	X X X	67,470	65,094	X X X	X X X	X X X	X X X	X X X	X X X
1985	X X X	X X X	X X X	X X X	X X X	6,836	X X X	X X X	X X X	X X X	X X X	133.41

SCHEDULE P - PART 2D - WORKERS' COMPENSATION

(1) Years in Which Losses Were Incurred	INCURRED LOSSES AND LOSS EXPENSE REPORTED AT END OF YEAR (000 OMITTED) (2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	INCURRED LOSS AND LOSS EXPENSE RATIO REPORTED (8) 1980	(9) 1981	(10) 1982	(11) 1983	(12) 1984	(13) 1985
1 Prior to 1980	2,412,902	2,340,063	2,327,237	2,381,718	2,366,863	2,356,593	X X X	X X X	X X X	X X X	X X X	X X X
2 1980	318,992	289,398	302,845	260,116	288,229	282,593	77.21	70.14	73.40	67.80	69.85	68.49
3 Cumulative Total	2,731,184	2,629,461	2,630,082	2,641,834	2,655,092	2,639,186	X X X	X X X	X X X	X X X	X X X	X X X
4 1981	X X X	378,131	370,730	292,744	313,052	303,057	X X X	86.89	85.18	67.27	71.93	69.64
5 Cumulative Total	X X X	3,007,592	3,000,812	2,934,578	2,968,144	2,942,243	X X X	X X X	X X X	X X X	X X X	X X X
6 1982	X X X	X X X	309,327	403,606	321,052	312,411	X X X	X X X	69.38	90.53	72.01	70.07
7 Cumulative Total	X X X	X X X	3,310,139	3,338,184	3,289,196	3,254,654	X X X	X X X	X X X	X X X	X X X	X X X
8 1983	X X X	X X X	X X X	344,616	395,617	391,581	X X X	X X X	X X X	70.63	81.09	80.26
9 Cumulative Total	X X X	X X X	X X X	3,682,800	3,684,813	3,646,235	X X X	X X X	X X X	X X X	X X X	X X X
10 1984	X X X	X X X	X X X	X X X	495,938	531,771	X X X	X X X	X X X	X X X	90.76	97.32
11 Cumulative Total	X X X	X X X	X X X	X X X	4,180,751	4,179,006	X X X	X X X	X X X	X X X	X X X	X X X
12 1985	X X X	X X X	X X X	X X X	X X X	547,211	X X X	X X X	X X X	X X X	X X X	110.12

SCHEDULE P - PART 2E - FARMOWNERS MULTIPLE PERIL, HOMEOWNERS MULTIPLE PERIL, COMMERCIAL MULTIPLE PERIL, OCEAN MARINE, AIRCRAFT (ALL PERILS) AND BOILER AND MACHINERY

1 Prior to 1980	1,054,435	1,057,566	1,061,078	1,060,731	1,057,250	1,057,462	X X X	X X X	X X X	X X X	X X X	X X X
2 1980	228,466	224,652	228,742	227,155	230,243	230,566	69.00	67.85	69.08	68.60	69.54	69.63
3 Cumulative Total	1,282,901	1,282,218	1,289,820	1,287,886	1,287,493	1,288,028	X X X	X X X	X X X	X X X	X X X	X X X
4 1981	X X X	272,121	263,680	267,206	264,371	271,031	X X X	78.82	76.37	77.40	76.57	78.50
5 Cumulative Total	X X X	1,554,339	1,553,500	1,555,092	1,551,864	1,559,059	X X X	X X X	X X X	X X X	X X X	X X X
6 1982	X X X	X X X	321,843	302,652	298,396	304,172	X X X	X X X	88.25	82.99	81.82	83.41
7 Cumulative Total	X X X	X X X	1,875,343	1,857,744	1,850,260	1,863,231	X X X	X X X	X X X	X X X	X X X	X X X
8 1983	X X X	X X X	X X X	346,626	350,320	340,339	X X X	X X X	X X X	85.32	86.23	83.77
9 Cumulative Total	X X X	X X X	X X X	2,204,370	2,200,580	2,203,570	X X X	X X X	X X X	X X X	X X X	X X X
10 1984	X X X	X X X	X X X	X X X	433,818	421,416	X X X	X X X	X X X	X X X	93.25	90.59
11 Cumulative Total	X X X	X X X	X X X	X X X	2,634,406	2,624,986	X X X	X X X	X X X	X X X	X X X	X X X
12 1985	X X X	X X X	X X X	X X X	X X X	421,297	X X X	X X X	X X X	X X X	X X X	88.15

SCHEDULE P - PART 3 - SUMMARY
Calendar Year Premiums Earned, Accident Year Loss and Loss Expense Incurred

	DOLLARS (000 omitted)							PERCENTAGES						
	(1) 1979	(2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	(8) 1979	(9) 1980	(10) 1981	(11) 1982	(12) 1983	(13) 1984	(14) 1985
Summary Data from Schedule P - Part 1 - Summary														
1 Premiums Earned	1,200,539	1,261,229	1,282,899	1,326,337	1,430,833	1,634,985	1,728,489	100.0	100.0	100.0	100.0	100.0	100.0	100.0
2 Loss and Loss Exp. Inc'd	754,083	876,637	976,057	1,089,145	1,264,590	1,588,554	1,817,040	62.8	69.5	76.1	82.1	88.4	97.0	105.1
Loss & Loss Expense through 1 year														
3 Paid	233,443	286,054	287,334	367,098	358,284	452,139	325,898	19.4	22.7	22.4	27.7	25.0	27.0	18.8
4 Reserve (2) - (3)	520,640	590,583	688,723	722,087	906,306	1,136,225	1,491,142	43.4	46.8	53.7	54.4	63.4	69.9	86.3
Loss & Loss Expense through 2 years														
5 Paid	427,307	490,942	510,474	607,610	709,939	878,136	x x	35.6	38.9	39.8	45.8	49.6	54.0	x x
6 Reserve (2) - (5)	326,696	385,695	465,583	481,535	554,651	710,418	x x	27.2	30.6	36.3	36.3	38.8	43.7	x x
Loss & Loss Expense through 3 years														
7 Paid	515,242	597,064	640,638	753,363	893,030	x x	x x	42.9	47.3	49.9	56.8	62.4	x x	x x
8 Reserve (2) - (7)	238,761	279,573	335,399	335,782	371,760	x x	x x	19.9	22.2	26.1	25.3	26.0	x x	x x
Loss & Loss Expense through 4 years														
9 Paid	582,968	675,151	738,176	864,115	x x	x x	x x	48.6	53.5	57.5	65.2	x x	x x	x x
10 Reserve (2) - (9)	171,035	201,486	237,881	225,030	x x	x x	x x	14.3	16.0	18.5	17.0	x x	x x	x x
Loss & Loss Expense through 5 years														
11 Paid	630,606	739,543	808,210	x x	x x	x x	x x	52.5	58.6	63.0	x x	x x	x x	x x
12 Reserve (2) - (11)	123,397	137,094	167,847	x x	x x	x x	x x	10.3	10.9	13.1	x x	x x	x x	x x

SCHEDULE P - PART 3A - AUTO LIABILITY
Calendar Year Premiums Earned, Accident Year Loss and Loss Expense Incurred

	DOLLARS (000 omitted)							PERCENTAGES						
	(1) 1979	(2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	(8) 1979	(9) 1980	(10) 1981	(11) 1982	(12) 1983	(13) 1984	(14) 1985
Summary Data from Schedule P - Part 1A														
Premiums Earned	214,520	235,580	244,095	275,624	303,415	321,771	301,930	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Loss and Loss Exp. Inc'd	161,919	179,878	199,272	236,792	275,957	310,098	276,405	75.5	76.4	81.6	85.9	90.9	96.4	91.6
Loss & Loss Expense through 1 year														
Paid	61,481	72,430	76,125	95,250	99,274	110,881	93,514	28.7	30.7	31.2	34.6	32.7	34.5	31.0
Reserve (2) - (3)	100,438	107,448	123,147	141,542	176,683	199,217	182,891	46.8	45.6	50.4	51.3	58.2	61.9	60.6
Loss & Loss Expense through 2 years														
Paid	110,314	124,220	133,089	159,561	189,984	205,917	x x	51.4	52.7	54.5	57.9	62.6	64.0	x x
Reserve (2) - (5)	51,605	55,658	66,183	77,231	85,973	104,181	x x	24.1	23.6	27.1	28.0	28.3	32.4	x x
Loss & Loss Expense through 3 years														
Paid	130,113	148,178	161,926	195,972	233,175	x x	x x	60.7	62.9	66.3	71.1	76.9	x x	x x
Reserve (2) - (7)	31,806	31,700	37,346	40,820	42,782	x x	x x	14.8	13.5	15.3	14.8	14.1	x x	x x
Loss & Loss Expense through 4 years														
Paid	143,174	162,711	180,425	214,782	x x	x x	x x	66.7	69.1	73.9	77.9	x x	x x	x x
Reserve (2) - (9)	18,745	17,167	18,847	22,010	x x	x x	x x	8.7	7.3	7.7	8.0	x x	x x	x x
Loss & Loss Expense through 5 years														
Paid	151,974	171,093	189,605	x x	x x	x x	x x	70.8	72.6	77.7	x x	x x	x x	x x
Reserve (2) - (11)	9,945	8,785	9,667	x x	x x	x x	x x	4.6	3.7	4.0	x x	x x	x x	x x

SCHEDULE P - PART 3B - OTHER LIABILITY
Calendar Year Premiums Earned, Accident Year Loss and Loss Expense Incurred

	DOLLARS (000 omitted)							PERCENTAGES						
	(1) 1979	(2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	(8) 1979	(9) 1980	(10) 1981	(11) 1982	(12) 1983	(13) 1984	(14) 1985
Summary Data from Schedule P - Part 1B														
Premiums Earned	289,313	274,917	252,648	232,298	228,558	288,018	447,537	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Loss and Loss Exp. Inc'd	145,973	175,102	196,383	229,452	253,027	322,841	566,091	50.5	63.7	77.8	98.8	110.7	112.1	126.5
Loss & Loss Expenses through 1 year														
Paid	12,520	12,525	72,557 -2,783	15,579	15,685	17,748	8,162 -25,715	4.3	4.6	(-)1.1	6.7	6.9	6.2	-5.7
Reserve (2) - (3)	133,453	162,577	199,086	213,873	237,342	305,093	591,806	46.1	59.1	78.9	92.1	103.8	105.9	132.2
Loss & Loss Expense through 2 years														
Paid	31,959	35,826	22,338	43,405	52,918	76,280	x x	11.0	13.0	8.9	18.7	23.2	26.5	x x
Reserve (2) - (5)	114,014	139,276	173,965	186,047	200,109	246,561	x x	39.4	50.7	68.9	80.1	87.6	85.6	x x
Loss & Loss Expense through 3 years														
Paid	53,075	63,272	55,935	88,557	104,794	x x	x x	18.4	23.0	22.2	34.7	45.9	x x	x x
Reserve (2) - (7)	92,898	111,830	140,368	148,895	148,233	x x	x x	32.1	40.7	55.6	64.1	64.9	x x	x x
Loss & Loss Expense through 4 years														
Paid	75,403	86,607	90,537	128,141	x x	x x	x x	26.1	31.5	35.9	55.2	x x	x x	x x
Reserve (2) - (9)	70,570	88,495	105,766	101,311	x x	x x	x x	24.4	32.2	41.9	43.6	x x	x x	x x
Loss & Loss Expense through 5 years														
Paid	92,375	114,828	117,614	x x	x x	x x	x x	31.9	41.8	46.6	x x	x x	x x	x x
Reserve (2) - (11)	53,598	60,274	78,689	x x	x x	x x	x x	18.5	21.9	31.2	x x	x x	x x	x x

SCHEDULE P - PART 1C - MEDICAL MALPRACTICE
Calendar Year Premiums Earned, Accident Year Loss and Loss Expense Incurred

	DOLLARS (000 omitted)							PERCENTAGES						
	(1) 1979	(2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	(8) 1979	(9) 1980	(10) 1981	(11) 1982	(12) 1983	(13) 1984	(14) 1985
Summary Data from Schedule P - Part 1C														
Premiums Earned	8,920	6,995	5,901	7,892	4,524	3,964	5,124	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Loss and Loss Exp. Inc'd	4,413	8,498	6,393	6,318	3,687	2,629	6,834	49.4	121.5	108.3	80.1	81.5	66.2	133.4
Loss & Loss Expense through 1 year														
Paid	482	185	953	542	411	74	-47	5.4	2.6	16.2	6.9	9.1	2.1	-.9
Reserve (2) - (3)	3,931	8,313	5,440	5,776	3,276	2,355	6,883	44.0	118.8	92.2	73.2	72.4	66.1	134.3
Loss & Loss Expense through 2 years														
Paid	604	560	1,180	708	652	426	x x	7.0	8.1	20.2	9.0	14.4	12.0	x x
Reserve (2) - (5)	3,719	7,939	5,203	5,610	3,035	2,003	x x	41.7	113.4	88.2	71.1	67.1	56.2	x x
Loss & Loss Expense through 3 years														
Paid	1,279	1,133	2,480	1,874	1,740	x x	x x	14.3	16.2	42.1	23.8	38.5	x x	x x
Reserve (2) - (7)	3,134	7,365	3,911	4,444	1,947	x x	x x	35.1	105.3	66.3	56.3	43.0	x x	x x
Loss & Loss Expense through 4 years														
Paid	1,443	2,266	3,127	2,176	x x	x x	x x	16.2	32.4	53.0	27.6	x x	x x	x x
Reserve (2) - (9)	2,970	6,232	3,266	4,142	x x	x x	x x	33.3	89.1	55.3	52.5	x x	x x	x x
Loss & Loss Expense through 5 years														
Paid	1,867	3,407	3,652	x x	x x	x x	x x	20.9	48.9	61.9	x x	x x	x x	x x
Reserve (2) - (11)	2,546	5,011	2,741	x x	x x	x x	x x	28.5	71.6	46.5	x x	x x	x x	x x

SCHEDULE P - PART 1D - WORKERS' COMPENSATION
Calendar Year Premiums Earned, Accident Year Loss and Loss Expense Incurred

	DOLLARS (000 omitted)							PERCENTAGES						
	(1) 1979	(2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	(8) 1979	(9) 1980	(10) 1981	(11) 1982	(12) 1983	(13) 1984	(14) 1985
Summary Data from Schedule P - Part 1D														
Premiums Earned	375,949	412,621	435,207	445,830	487,085	546,425	496,945	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Loss and Loss Exp. Inc'd	245,422	282,503	303,057	312,411	391,581	531,771	547,211	65.3	68.5	69.6	70.1	80.3	97.3	110.1
Loss & Loss Expense through 1 year														
Paid	69,255	91,325	93,677	98,919	95,239	138,822	101,108	18.4	22.1	21.5	22.2	19.5	25.4	20.4
Reserve (2) - (3)	176,167	191,288	209,380	213,492	296,342	392,949	446,103	46.9	46.4	48.1	47.9	60.7	71.9	89.8
Loss & Loss Expense through 2 years														
Paid	134,691	161,702	169,348	176,148	209,047	294,423	x x	35.8	39.2	38.9	39.5	42.9	53.9	x x
Reserve (2) - (5)	110,731	120,801	133,712	136,263	182,534	237,348	x x	29.5	29.3	30.7	30.6	37.4	43.4	x x
Loss & Loss Expense through 3 years														
Paid	167,999	199,786	209,285	221,792	272,278	x x	x x	44.7	48.4	48.1	49.8	55.8	x x	x x
Reserve (2) - (7)	77,423	82,827	93,772	90,619	119,303	x x	x x	20.6	20.1	21.6	20.3	24.5	x x	x x
Loss & Loss Expense through 4 years														
Paid	188,224	224,961	236,641	249,053	x x	x x	x x	50.1	54.5	54.4	55.9	x x	x x	x x
Reserve (2) - (9)	57,198	57,632	66,416	63,358	x x	x x	x x	15.2	14.0	15.3	14.2	x x	x x	x x
Loss & Loss Expense through 5 years														
Paid	200,357	239,671	253,644	x x	x x	x x	x x	53.3	58.1	58.3	x x	x x	x x	x x
Reserve (2) - (11)	45,065	42,922	49,413	x x	x x	x x	x x	12.0	10.4	11.3	x x	x x	x x	x x

SCHEDULE P - PART 1E - FARMOWNERS MULTIPLE PERIL, HOMEOWNERS MULTIPLE PERIL, COMMERCIAL MULTIPLE PERIL, OCEAN MARINE, AIRCRAFT (ALL PERILS) AND BOILER AND MACHINERY
Calendar Year Premiums Earned, Accident Year Loss and Loss Expense Incurred

	DOLLARS (000 omitted)							PERCENTAGES						
	(1) 1979	(2) 1980	(3) 1981	(4) 1982	(5) 1983	(6) 1984	(7) 1985	(8) 1979	(9) 1980	(10) 1981	(11) 1982	(12) 1983	(13) 1984	(14) 1985
Summary Data from Schedule P - Part 1D														
Premiums Earned	311,831	331,108	345,348	364,604	406,270	465,206	477,953	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Loss and Loss Exp. Inc'd	196,276	230,566	271,031	304,172	340,339	421,416	421,297	62.9	69.6	78.5	83.4	83.8	90.6	88.2
Loss & Loss Expense through 1 year														
Paid	89,704	109,589	119,362	156,706	147,675	184,803	157,038	28.8	33.1	34.6	43.0	36.3	39.7	32.9
Reserve (2) - (3)	106,572	120,977	151,669	147,466	192,664	236,613	264,259	34.2	36.5	43.9	40.4	47.4	50.9	55.3
Loss & Loss Expense through 2 years														
Paid	149,648	168,626	184,511	227,787	257,338	301,089	x x	48.0	50.9	53.4	62.5	63.3	64.7	x x
Reserve (2) - (5)	46,628	61,940	86,520	76,385	83,001	120,327	x x	14.9	18.7	25.1	21.0	20.4	25.9	x x
Loss & Loss Expense through 3 years														
Paid	162,775	184,715	211,030	253,108	280,863	x x	x x	52.2	55.8	61.1	69.4	69.1	x x	x x
Reserve (2) - (7)	33,501	45,851	60,001	51,064	59,476	x x	x x	10.7	13.8	17.4	14.0	14.6	x x	x x
Loss & Loss Expense through 4 years														
Paid	174,723	198,604	227,446	269,962	x x	x x	x x	56.0	60.0	65.9	74.0	x x	x x	x x
Reserve (2) - (9)	21,553	31,962	43,585	34,210	x x	x x	x x	6.9	9.6	12.6	9.4	x x	x x	x x
Loss & Loss Expense through 5 years														
Paid	184,033	210,464	243,695	x x	x x	x x	x x	59.0	63.6	70.6	x x	x x	x x	x x
Reserve (2) - (11)	12,243	20,102	27,336	x x	x x	x x	x x	3.9	6.1	7.9	x x	x x	x x	x x

Note:-Item 2 is taken from this year's Schedule P - Part 1 and is consequently updated each year. Items 3,5,7, 9 and 11 are taken from the Schedule P - Part 1 of the year indicated by the heading immediately above each item, and consequently do not change after once being entered.

ANNUAL STATEMENT FOR THE YEAR 1985 OF THE CRUM & FORSTER INSURANCE COMPANIES

SCHEDULE Y — ORGANIZATIONAL CHART

Attach a chart or listing presenting the identities of and interrelationships among all affiliated insurers and all other affiliates, identifying all insurers as such. No non-insurer affiliate need be shown if its total assets are less than ½ of 1% of the total assets of the largest affiliated insurer.

INSURANCE HOLDING COMPANY SYSTEM ORGANIZATIONAL CHART

All controlled persons and controlled insurers of Crum and Forster, Inc., a New Jersey corporation, (under applicable state insurance holding company laws), are set forth in the following table, together with the jurisdiction of domicile of each and the percentage of voting securities owned as of 1/1/86. Unless otherwise indicated, all of the persons included in the table are corporations, the voting securities of which are directly owned by Crum and Forster, Inc. All of the outstanding capital stock of Crum and Forster, Inc. is owned by Xerox Financial Services, Inc., a Delaware corporation, which is a wholly-owned subsidiary of Xerox Corporation, a New York corporation. The controlled persons of Xerox Corporation are set forth in the list attached hereto.

Name of Subsidiary	Jurisdiction of Incorporation	Percentage of Voting Securities Owned
International Insurance Company	Illinois	100
Crum and Forster Insurance Company	New Jersey	100(1)
Seaboard Underwriters, Inc.	North Carolina	100(1)
Seaboard Underwriters Agency, Inc.	Illinois	100(1)
Premier Insurance Company	Florida	100(1)
The North River Insurance Company	New Jersey	100
Xerox Financial Services Life Insurance Company	Missouri	100(1)
International Marine Underwriters of New England, Inc.	Massachusetts	'(1)
Crum & Forster Underwriters Co. of Ohio	Ohio	100(1)
United States Fire Insurance Company	New York	100
American Eagle Insurance Company	Texas	100(1)
Crum & Forster Insurance Company (Bermuda) Ltd.	Bermuda	100(1)(2)
Westchester Fire Insurance Company	New York	100
Mt. Airy Insurance Company	Indiana	100(1)
Star Insurance Company	North Carolina	100(1)
Industrial Indemnity Company	California	100
Viking Insurance Company of Wisconsin	Wisconsin	100(1)
Viking General Agency, Inc.	Texas	100(1)
International Surplus Lines Insurance Company	Illinois	100(1)
CFMC, Inc.	New York	100(1)
Richard Whiley, Inc.	New York	100(1)
LWB Syndicate Inc.	Illinois	79.2(1)(2
L. W. Biegler Inc. (Fla.)	Florida	100(1)
Savings Insurance Exchange Group Agency, Inc.	Florida	100(1)
R. L. Blum & Co.	Florida	100(1)
Rome Underwriters, Inc.	Florida	100(1)
The Savings Insurance and Retirement Plan Group, Inc.	Florida	100(1)
Financial Insurance Management Agency, Inc.	Florida	100(1)
Industrial Underwriters Insurance Company	Texas	100(1)
All West Insurance Company	California	100(1)
Industrial Insurance Company of Hawaii, Ltd.	Hawaii	100(1)
Industrial Indemnity Company of Alaska	Alaska	100(1)
Industrial Indemnity Company of the Northwest	Washington	100(1)
Industrial Indemnity Life Insurance Company	California	100(1)
California Insurance Company	California	100(1)
Industrial Indemnity Company of Idaho	Idaho	100(1)(2)
Industrial Insurance Company	California	100(1)
CALPAC Holding Company, Inc.	Bermuda	38.3(1)
CALPAC Insurance Company Ltd.	Bermuda	100(1)
Claremont Holdings Limited	Bermuda	13.7(1)
Claremont Insurance Limited	Bermuda	100(1)
Constitution Reinsurance Corporation	New York	100(1)(3)
Constitution Reassurance S.A.	Belgium	100(4)
The London Agency, Inc.	Georgia	100
Floyd West & Company	Texas	100
Commonwealth County Mutual Insurance Company	Texas	---(5)
Commonwealth Lloyd's Insurance Company	Texas	---(6)
L. W. Biegler Inc.	Illinois	100
L. W. Biegler Inc. (N.J.)	New Jersey	100
Crum & Forster Managers Corporation (N.Y.)	New York	100
Crum & Forster of Canada Ltd.	Canada	100
L. W. Biegler (Canada) Inc.	Canada	100(1)
Herald Insurance Company	Canada	100(7)
Industrial Underwriters, Inc.	Nevada	100
Industrial Excess & Surplus Insurance Brokers	California	100(1)
Industrial Indemnity Insurance Services, Inc.	California	100(1)
155 California Corporation	California	100(1)
Industrial Indemnity Financial Corporation	California	100(1)
Dimensional Corporate Finance, Inc.	California	21(1)
Industrial Indemnity Securities, Inc.	California	100(1)
American Health Capital GIBI Management, Inc.	New York	10(1)
Multicomp Employer's Association, Inc.	California	100(1)
OSIB Corporation	California	100(1)
One Stop Insurance Shop, Inc.	California	100(1)
Aviation Office of America, Inc.	Texas	100
Aviation Reinsurance Management Incorporated	Texas	100(1)
Aviation Reinsurance Management (London) Ltd.	United Kingdom	100(1)(2)
Aviation Extended Reinsurance Organization, Inc.	Texas	100(1)
American Meridian Insurance Company Limited	Bermuda	100(1)(2)
Aviation Adjustment Bureau, Inc.	Texas	100(1)
Crum & Forster Corporation	New Jersey	100
J. H. Blades & Co., Inc.	Texas	100
J. H. Blades, Inc.	Oklahoma	100(1)
Crum & Forster of Louisiana, Inc.	Louisiana	100(1)
J. H. Blades of Louisiana, Inc.	Louisiana	100(1)
The London Agency of Louisiana, Inc.	Louisiana	100(1)
Viking General Agency of Louisiana, Inc.	Louisiana	100(1)
Fairfax Underwriters Services, Inc.	Missouri	100
Canfield Advertising Associates, Inc.	New Jersey	100
NAVCO Corp.	Missouri	100(1)(8)
National General Insurance Company	Missouri	100(1)
National General Assurance Company	Missouri	100(1)
National General Services Corporation	Missouri	100(1)
First Quadrant Corp.	New Jersey	100

1. Directly or indirectly owned by a subsidiary of Crum and Forster, Inc.
2. Includes qualifying shares held by directors.
3. Owned by three subsidiaries of Crum and Forster, Inc. in the following percentages:
   - United States Fire Insurance Company - 55%
   - The North River Insurance Company - 35%
   - Westchester Fire Insurance Company - 10%
4. Includes qualifying shares held by individuals.
5. County Mutual Company. Control maintained through management contract with Floyd West & Company.
6. Lloyd's insurer. Control maintained through Power of Attorney held by Floyd West & Company.
7. Includes less than 1/5 of 1% of shares beneficially owned by directors.
8. Owned by two subsidiaries of Crum and Forster, Inc. in the following percentages:
   - United States Fire Insurance Company - 50%
   - International Insurance Company - 50%

SCHEDULE T – EXHIBIT OF PREMIUMS WRITTEN

Allocated by States and Territories

1 States Etc	1a Is Insurer Licensed? (Yes or No)	Gross Premiums, Including Policy and Membership Fees, Less Return Premiums and Premiums on Policies Not Taken 2 Direct Premiums Written	 3 Direct Premiums Earned	4 Dividends Paid or Credited to Policyholders on Direct Business	5 Direct Losses Paid (Deducting Salvage)	6 Direct Losses Incurred	7 Direct Losses Unpaid	8 Finance and Service Charges Not Included in Premiums
LABAMA AL	Yes	27,150,255	25,748,947	120,628	14,447,876	25,288,327	32,877,348	13,979
LASKA AK	Yes	49,217,829	49,205,678	364,598	22,096,673	41,440,168	47,750,293	23,258
RIZONA AZ	Yes	41,081,503	36,627,860	392,731	19,595,085	33,784,686	56,159,058	4,767
RKANSAS AR	Yes	22,735,555	18,861,076	156,348	33,719,058	47,178,710	26,989,431	8,114
ALIFORNIA CA	Yes	784,371,659	695,226,474	50,215,822	357,108,276	721,265,693	954,427,338	347,883
OLORADO CO	Yes	41,195,391	40,433,141	307,698	31,518,052	52,399,059	57,771,630	18,442
ONNECTICUT CT	Yes	40,583,596	33,020,784	527,627	11,271,708	36,580,512	80,415,236	52,501
ELAWARE DE	Yes	3,207,089	3,234,314	22,803	915,616	4,606,462	7,087,303	707
IST.COLUMBIA DC	Yes	12,858,609	12,030,031	100,024	4,934,305	10,014,062	21,205,837	388
LORIDA FL	Yes	144,971,505	129,779,827	1,228,784	71,262,107	130,230,527	168,651,286	155,183
EORGIA GA	Yes	53,743,039	48,098,862	268,159	31,876,766	56,596,784	67,599,711	35,574
AWAII HI	Yes	32,828,333	30,213,258	1,659,568	10,698,715	17,098,305	30,981,505	0
DAHO ID	Yes	21,511,117	19,093,043	386,088	15,384,734	13,408,456	31,524,513	5,891
LLINOIS IL	Yes	133,638,699	134,046,148	264,733	59,572,656	155,483,024	242,641,823	30,719
NDIANA IN	Yes	38,203,788	34,370,594	147,352	22,823,336	34,462,257	40,112,508	13,253
OWA IA	Yes	15,204,281	14,599,043	117,150	6,030,939	18,124,938	27,793,812	5,647
ANSAS KS	Yes	20,301,167	18,135,560	104,984	15,688,018	14,043,170	30,497,946	2,575
ENTUCKY KY	Yes	17,245,257	16,376,264	161,176	8,279,195	12,828,145	25,715,394	12,069
OUISIANA LA	Yes	69,253,125	63,509,336	578,535	46,244,861	62,419,646	102,463,612	22,380
AINE ME	Yes	6,212,860	6,236,558	100,747	2,760,177	7,036,015	11,125,633	2,711
ARYLAND MD	Yes	40,226,239	31,053,179	667,101	14,196,336	31,657,007	45,056,831	25,188
ASSACHUSETTS MA	Yes	72,033,314	63,430,944	1,083,935	23,999,442	53,526,109	106,142,875	3,589
ICHIGAN MI	Yes	52,734,885	57,688,331	2,267,881	23,688,364	48,355,296	82,732,156	22,858
INNESOTA MN	Yes	62,654,851	52,803,997	823,338	23,419,757	46,287,318	72,801,345	17,717
ISSISSIPPI MS	Yes	15,916,348	15,695,471	94,308	15,831,018	20,207,137	16,919,217	12,770
ISSOURI MO	Yes	44,965,682	42,852,971	1,009,094	27,378,151	54,539,030	92,563,607	13,341
ONTANA MT	Yes	6,615,019	6,683,602	41,009	5,300,938	11,073,783	13,472,326	632
EBRASKA NE	YES	9,709,172	8,670,723	157,198	5,277,299	8,089,942	12,428,792	3,750
EVADA NV	Yes	14,168,692	11,735,570	5,058	5,862,345	8,596,402	8,709,149	2,688
EW HAMPSHIRE NH	Yes	6,707,889	5,614,284	53,999	6,863,908	9,687,921	9,185,806	8,621
EW JERSEY NJ	Yes	122,627,365	108,645,428	2,329,235	49,210,288	75,218,496	144,194,337	82,433
EW MEXICO NM	Yes	15,250,830	13,910,204	105,154	9,784,885	13,485,796	12,647,663	22,865
EW YORK NY	Yes	214,488,674	196,098,089	1,522,095	110,638,084	289,746,645	371,269,030	185,999
O.CAROLINA NC	Yes	61,149,033	55,842,748	272,447	36,277,558	41,229,958	44,291,009	93,530
O.DAKOTA ND	Yes	6,194,471	5,887,202	481	3,128,337	3,976,719	4,648,051	687
HIO OH	Yes	59,108,165	50,525,133	46,194	22,481,674	55,137,784	70,193,059	10,728
KLAHOMA OK	Yes	27,774,804	29,460,548	426,956	21,840,053	35,687,637	46,901,384	27,652
REGON OR	Yes	51,912,139	48,640,523	159,925	52,943,361	70,613,787	77,137,634	5,332
ENNSYLVANIA PA	Yes	119,174,874	92,505,960	1,343,981	34,284,642	93,896,306	147,549,885	47,539
ODE ISLAND RI	Yes	4,511,634	3,924,380	14,593	1,439,361	5,231,919	6,313,717	2,168
. CAROLINA SC	Yes	30,739,122	26,564,971	112,727	13,681,604	20,572,414	26,757,898	26,399
. DAKOTA SD	Yes	7,054,462	7,075,251	124,688	3,824,842	5,074,317	7,013,153	2,056
ENNESSEE TN	Yes	47,371,999	39,934,898	205,666	25,620,347	42,726,157	51,766,049	46,368
XAS TX	Yes	356,111,976	335,502,543	9,097,847	282,508,705	363,181,297	437,462,134	554,900
AH UT	Yes	16,002,499	1[illegible],280,853	41,719	9,087,956	12,371,838	15,097,772	6,954
ERMONT VT	Yes	2,387,498	2,150,897	22,740	557,956	2,272,657	3,201,201	797
IRGINIA VA	Yes	47,172,121	42,085,125	565,379	19,374,297	36,676,843	65,181,964	69,555
ASHINGTON WA	Yes	56,457,[illegible]	51,440,899	1,496,553	35,236,871	71,862,631	63,036,877	35,668
EST VIRGINIA WV	Yes	5,704,378	5,077,155	0	4,039,509	7,862,372	10,252,484	1,054
ISCONSIN WI	Yes	55,692,486	51,019,887	405,746	26,513,528	52,338,052	57,352,542	18,836
YOMING WY	Yes	4,816,759	4,485,794	0	1,289,339	3,240,334	3,977,117	9,342
MER. SAMOA AS	No	0	0	0	0	0	0	0
UAM GU	No	8,417	10,136	0	0	(1,500)	0	0
UERTO RICO PR	Yes	349,056	507,347	0	129,069	635,649	1,252,793	(2
.S.VIRGIN IS. VI	Yes	710,345	665,609	0	5,000	54,519	219,334	0
ANADA CN	Yes	19,592,832	20,283,588	0	10,037,579	13,169,339	28,886,073	74
THER ALIEN **OT	No	0	0	0	0	0	0	0
THER FOREIGN	YES	50,597,394	47,652,739		33,821,506	63,316,395	42,144,865	0
OTALS	[illegible]	3,2[illegible],085,612	2,965,254,568	83,495,332	1,744,934,062	3,075,287,250	4,252,551,058	2,117,993

Explanation of basis of allocation of premiums by states, etc.

NOTE: Figures do not agree due to rounding to dollars only
Line 1,2,3,4,5,12,17,19,21,25,26,27,28, - Location of property insured.
Line 14,15,16,21,24 - Location of insured.
Line 8 - Builders risks are allocated to states in which the risks are located; company adheres to allocation by syndicates on business reported by them; other risks are allocated to states wherein the contracts of insurance were negotiated and placed.
Li. 9 - Bridges and tunnels are allocated to states in which properties are located; other risks are allocated to states appearing on polic.es as addresses of assureds except that in case of periods of extended exposure, to states wherein the subject matter is principally exposed.
Line 22 - Location of airport from which insured aircraft principally operate.
Finance and service charges will not agree to Pg. 4 Line 11 due to inter company pooling.

Total for Column 2 to agree with the total of Column 1 in Part 2C, Page 8. Total for Column 5 to agree with the total of Column 1 in Part 3, Page 9

Total for Column 6 to agree with the sum of totals for Columns 5 and 7 less the total for Column 7 in the previous annual statement

Total for Column 7 to equal Part 3A, Page 10, totals for Columns 1a and 4a. Total for Column 8 to agree with Item 11, Page 4

All U.S. business must be allocated by state regardless of license status

*Insert the number of yes responses except for Canada and Other alien

FOR THE YEAR ENDED DECEMBER 31 1985

OF THE WESTCHESTER FIRE INSURANCE COMPANY INSURANCE COMPANY

ADDRESS City State and Zip Code [illegible]

NAIC Group Code NAIC Company Code [illegible]

REPORT TO THE STATE OF

(To Be Filed Not Later Than May 1, 1986)

EXHIBIT OF PREMIUMS AND LOSSES BY STATE — PRODUCTS LIABILITY INSURANCE

States, Etc.		Gross Premiums, Including Policy and Membership Fees, Less Return Premiums and Premiums on Policies Not Taken		3		5	
		Direct Premiums Written	Direct Premiums Earned*	Dividends Paid or Credited to Policyholders on Direct Business	Direct Losses Paid (Deducting Salvage)	Direct Losses Incurred	Direct Losses Unpaid
1 Alabama	AL	7,561	7,037			6,862	9,221
2 Alaska	AK						
3 Arizona	AZ	1,777	3,058			1,139	2,023
4 Arkansas	AR	12,812	9,154			4,157	4,230
5 California	CA	11,305	11,117		3,017	(1,354)	9,074
6 Colorado	CO	100,626	107,729		5,054	53,091	162,011
7 Connecticut	CT	163,280	117,773			22,014	74,057
8 Delaware	DE	1,747	1,625			446	1,627
9 Dist. Columbia	DC	4,237	3,728			851	1,796
10 Florida	FL	13,393	17,212		655	1,169	10,645
11 Georgia	GA	115,655	87,390			(2,474)	42,355
12 Hawaii	HI	771	570			(541)	262
13 Idaho	ID	126	403		1,154	1,033	193
14 Illinois	IL	23,198	34,976		500,511	(22,162)	154,017
15 Indiana	IN	37,638	22,361		515	(2,354)	23,074
16 Iowa	IA	27,776	13,593		427	(3,505)	6,658
17 Kansas	KS	93,390	58,157		1,000	(8,491)	27,170
18 Kentucky	KY	4,856	7,282			(2,437)	3,735
19 Louisiana	LA	24,217	24,068			18,162	82,229
20 Maine	ME	2,398	2,857			1,712	1,712
21 Maryland	MD	59,341	29,356		52	12,483	17,613
22 Massachusetts	MA	37,427	34,231		188	4,372	26,189
23 Michigan	MI	263,044	220,340		67	138,397	430,775
24 Minnesota	MN	208,403	142,792		10,106	1,179	149,628
25 Mississippi	MS	30,789	32,339		1,473	(9,889)	17,426
26 Missouri	MO	102,218	93,517		375	(10,406)	63,823
27 Montana	MT						
28 Nebraska	NE	55,450	16,334			6,726	9,460
29 Nevada	NV	24	24			(266)	12
30 New Hampshire	NH	8,134	7,400			4,495	4,495
31 New Jersey	NJ	175,107	110,527		25	44,471	72,878
32 New Mexico	NM	56	98			(42)	47
33 New York	NY	750,083	603,835		43,063	149,967	472,080
34 No. Carolina	NC	44,910	29,505		240	21,181	40,423
35 No. Dakota	ND	56,766	49,531			2,941	22,834
36 Ohio	OH	156,343	146,976		13,371	18,028	101,551
37 Oklahoma	OK	9,318	6,257		338	(1,596)	2,920
38 Oregon	OR						
39 Pennsylvania	PA	45,549	31,175		2,529	(1,197)	52,988
40 Rhode Island	RI	560	595				368
41 So. Carolina	SC	97,312	53,495		631	37,937	47,905
42 So. Dakota	SD	41,116	38,500		2,058	9,314	57,635
43 Tennessee	TN	15,573	15,798			(1,664)	7,870
44 Texas	TX	51,101	64,357			3,415	104,721
45 Utah	UT	16	40			(1,244)	86
46 Vermont	VT	1,198	1,195			369	637
47 Virginia	VA	19,437	10,333		175	3,863	5,281
48 Washington	WA	[illegible]	[illegible]			837	395
49 West Virginia	WV	2,707	2,777			(40)	765
50 Wisconsin	WI	130,592	107,777		71	9,150	63,995
51 Wyoming	WY	16,256	[illegible]		277	77	4,760
52 American Samoa	AS						
53 Guam	GU						
54 Puerto Rico	PR	794	11			126	126
55 U.S. Virgin Is.	VI						
98 Totals**		[illegible]	[illegible]		[illegible]	509,367	2,396,345

*Direct premiums earned may be estimated by [illegible]

**Column 2 to agree with line [illegible] Part [illegible]

UNDERWRITING AND INVESTMENT EXHIBIT — PRODUCTS LIABILITY

PART 2 — PREMIUMS EARNED

	B.I.	P.D.	TOTAL
1 Net premiums written per line 4, Part 2C	10,705,575	915,446	11,621,021
2 Unearned premiums December 31, previous year	[illegible]	[illegible]	[illegible]
3 Unearned premiums December 31, current year per line 7, Part 2B	5,185,563	224,209	5,409,772
4 Premiums earned during year (Lines 1 + 2 − 3)	[illegible]	[illegible]	[illegible]

PART 2A — PREMIUMS IN FORCE

	B.I.	P.D.	TOTAL
1 In force, December 31, last year without deducting reinsurance	6,388,984	484,628	6,873,612
2 Premiums written or renewed during year, per lines 1 and 2, Part 2C	13,902,513	946,621	14,849,134
3 Excess of original premiums over amount received for additional premiums and reinsurance	0	0	0
4 Deduct expirations and excess of original premiums over return premiums on cancellations	9,101,930	815,499	9,917,429
5 In force at end of year (Lines 1 + 2 + 3 − 4)	11,189,567	615,750	11,805,317
6 Deduct reinsurance in force, authorized and unauthorized companies	337,271	3,304	340,575
7 Net premiums in force (Lines 5-6)	10,852,296	612,446	11,464,742

PART 2B — RECAPITULATION OF ALL PREMIUMS

+ Gross premiums (less reinsurance) and unearned premiums on all unexpired risks and reserve for return premiums under rate credit or retrospective rating plans based upon experience, viz:

	B.I.	P.D.	TOTAL
1 Premiums in force running one year or less from date of policy	10,221,007	605,468	10,826,475
2 Amount unearned running one year or less from date of policy*	5,022,786	220,614	5,243,400
3 Premiums in force running more than one year from date of policy	631,289	6,978	638,267
4 Amount unearned running more than one year from date of policy*	162,777	3,595	166,372
5 Advance premiums (100%)	0	0	0
6 Reserve for rate credits and retrospective returns based on experience	0	0	0
7 Total reserve for unearned premiums (Lines 2 + 4 + 5 + 6)	5,185,563	224,209	5,409,772

+ By gross premiums is meant the aggregate of all the premiums written in the policies or renewals in force. Are they so returned in this supplement? Answer Yes

* State here basis of computation used in each case Monthly Pro-Rata

PART 2C — PREMIUMS WRITTEN

Gross premiums (less return premiums), including policy and membership fees, written and renewed during year

	B.I.	P.D.	TOTAL
1 Direct business	3,196,938	31,175	3,228,113
2 Reinsurance assumed	10,705,575	915,446	11,621,021
3 Reinsurance ceded	3,196,938	31,175	3,228,113
4 Net premiums written (Lines 1 + 2 − 3)	10,705,575	915,446	11,621,021

UNDERWRITING AND INVESTMENT EXHIBIT — PRODUCTS LIABILITY

PART 3 — LOSSES PAID AND INCURRED

Losses Paid Less Salvage	B.I.	P.D.	TOTAL
1 Direct Business	585,873	4,167	590,040
2 Reinsurance Assumed	1,382,061	(380,404)	1,002,657
3 Reinsurance Recovered	585,873	4,167	590,040
4 Net Payments (Lines 1 + 2 − 3)	1,382,061	(380,404)	1,002,657
5 Net Losses Unpaid Current Year (Part 3A Line 5)	15,618,952	(1,955,127)	13,663,825
6 Net Losses Unpaid Previous Year	12,227,986	(1,339,989)	10,887,997
7 Losses Incurred Current Year (Lines 4 + 5 − 6)	4,774,027	(995,542)	3,778,485
8 Ratio Losses Incurred to Premiums Earned (Line 7 ÷ Line 4 Part 2)	56.91	(110.93)	40.69

PART 3A — UNPAID LOSSES AND LOSS ADJUSTMENT EXPENSES

Adjusted or in Process of Adjustment	B.I.	P.D.	TOTAL
1a Direct	622,094	27,500	649,594
1b Reinsurance Assumed	3,858,374	693,102	4,551,476
2 Direct Reinsurance Recoverable from Authorized and Unauthorized Companies	622,094	27,500	649,594
3 Net Losses Excluding Incurred But Not Reported (Lines 1a + 1b − 2)	3,858,374	693,102	4,551,476
Incurred But Not Reported			
4a Direct	1,724,507	22,244	1,746,751
4b Reinsurance Assumed Less Ceded	11,760,578	(2,648,229)	9,112,349
4c Reinsurance Ceded	1,724,507	22,244	1,746,751
5 Net Losses unpaid Excluding Loss Adjustment Expenses (Lines 3 + 4a + 4b − 4c) per Schedule P Part 1 Column 9 total	15,618,952	(1,955,127)	13,663,825
6 Unpaid Loss Adjustment Expenses per Schedule P Part 1 Column 10 total	4,657,986	147,939	4,805,925

INSURANCE EXPENSE EXHIBIT — PART II —PRODUCTS LIABILITY
("000" Omitted)

A. PREMIUMS, LOSSES, EXPENSES AND NET INCOME, AND RATIOS TO EARNED PREMIUMS.	Amount	%
1 Net Premiums Written (Part 2C Line 4)	11,621	XXX
2 Net Premiums Earned (Part 2 Line 4)	9,286	100.0
3 Net Losses Incurred (Part 3 Line 7)	3,778	40.7
4 Loss Adjustment Expenses Incurred	1,082	11.6
5 Commission and Brokerage Incurred	1,850	19.9
6 Other Acquisition, Field Supervision and Collection Expenses Incurred	362	3.9
7 General Expenses Incurred	641	6.9
8 Taxes, Licenses and Fees Incurred	529	5.7
9 Total Expenses Incurred (Lines 4, 5, 6, 7 and 8)	4,464	48.1
10 Net Investment Gain or Loss and Other Income**	2,304	24.8
11 Dividends to Policyholders	0	-
12 Net Income before federal and foreign income taxes (Line 2 plus 10 minus 3, 9 and 11)	3,348	36.0

B. ADJUSTED DIRECT PREMIUMS AND EXPENSES (SEE NOTE C) AND RATIOS TO ADJUSTED DIRECT PREMIUMS WRITTEN*	Amount	%
13 Direct Premiums Written (Part 2C Line 1)	3,228	XXX
14 Adjusted Direct Premiums Written (See Note C)	3,228	100.0
15 Adjusted Direct Premiums Earned	2,491	100.0
16 Adjusted Direct Losses Incurred	509	15.8
17 Adjusted Direct Loss Adjustment Expenses Incurred	146	4.5
18 Direct Commission and Brokerage Incurred	561	XXX
19 Adjusted Direct Commission and Brokerage Incurred (See Note C)	561	17.4

*Expenses other than commission and brokerage can be developed from Section A

NOTE C — To relate equitably expenses incurred to premiums, where pooling agreements or similar arrangements exist between companies within a group and where companies operate through pools or associations and each company participates in the expenses on a basis of a fixed percentage, each company's direct premiums for the purpose of this exhibit shall be adjusted to produce its participation in the aggregate direct premiums of the group and further adjusted by substituting for the actual direct premiums on business written through associations, the participation of the company in the aggregate direct premiums of all members of each such association. No adjustment shall be necessary where the premiums of any syndicate or pool included in direct premiums written (Part 2C, Line 1) amount to less than 2% of the total direct premiums written.

Adjusted Direct Premiums Earned (Line 15) may be obtained by assuming the same ratios to Line 14 as earned to written ratios on a net basis.

NOTE that commissions shall be adjusted to correspond with the adjusted premiums.

**Instructions for Allocating Net Investment Gain or Loss and Other Income for Line 10

A Adjusted mean invested assets = Annual Statement Page 2, Lines 1 + 3 + 4 + 5 + 6.1 + 6.2 + 7 for current and prior years divided by 2

B Adjusted investment income = Annual Statement Page 6, Part 1, Column 8, Lines 10, 11, 12, 2.1, 2.11, 2.2, 2.21

C Adjusted Acquisition Expenses = IEE Part II Lines 5 + 6 + 8 plus ½ of Line 7

D Written Premium = IEE Part II Line 1

E Agents balances = Annual Statement Page 2, Lines 8.1 + 8.2 + 9 + 10

F Unearned premiums = Annual Statement Page 3, Line 10

G Adjusted mean unearned premiums attributable to this line of business = (½ (1 − $\frac{CE}{DF}$)) × Part 2 Lines 2 + 3. If negative, set equal to zero. Limit to a maximum of ½ Part 2 Lines 2 + 3

H Adjusted mean loss and loss expense reserves attributable to this line of business = (½ Part 3A Lines 5 + 6) + (½ Part 3, Line 6) + (½ previous Part 3A Line 6)

I Investment income attributable to this line of business = (G + H) × B ÷ A

J Investment income attributable to capital and surplus accounts = Annual Statement Page 4, Line 8 less the sum of I

K Realized capital gains attributable to capital and surplus accounts = Annual Statement Page 4, Line 9

L Other income attributable to this line of business = Annual Statement Page 4, Lines (5 + 17) − (Annual Statement Page 4, Line 1) × (Part 2, Line 4)

Interrogatory: Has Line 10 above been completed in accordance with these instructions? Answer ______ If not, explain ______

SCHEDULE P—PART 1—PRODUCTS LIABILITY

Years in Which Premiums Were Earned and Losses Were Incurred	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1 Prior to 1979	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2 1979	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	20.54
3 1980	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	24.59
4 1981	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	2,377,415	734,389	6,662,903	55.17
5 1982	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1,477,181	505,589	[illegible]	53.47
6 1983	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1,755,111	661,625	[illegible]	47.27
7 1984	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	2,161,512	[illegible]	[illegible]	50.92
8 1985	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	(57,109)	(9,611)	[illegible]	5,261,200	1,263,553	7,209,269	75.64
9 TOTALS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	6,999,304	12,359,197	XXX

(d) The term "loss expense" includes all payments for legal expenses, including attorneys' and witness fees and court costs, salaries and expenses of investigators, adjusters and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses and all other payments under or on account of such items, whether the payments are allocated to specific claims or are unallocated. Are they so reported in this supplement? Answer: Yes

(g) The unallocated loss expense payments paid during the most recent calendar year should be distributed to the various years in which losses were incurred as follows: (1) 45% to the most recent year, (2) 5% to the next most recent year, and (3) the balance to all years, including the most recent, in proportion to the amount of loss payments paid for each year during the most recent calendar year. If the distribution in (1) or (2) produces an accumulated distribution to such year in excess of 10% of the premiums earned for such year, disregarding all distributions made under (3), such accumulated distribution should be limited to 10% of premiums earned and the balance distributed in accordance with (3). Are they so reported in this supplement? Answer: Yes

SCHEDULE P—PART 2—PRODUCTS LIABILITY

1 Years in Which Losses Were Incurred	Incurred Losses and Loss Expense Reported at end of year (000 omitted)						Incurred Loss and Loss Expense Ratio Reported					
	2 1980	3 1981	4 1982	5 1983	6 1984	7 1985	8 1980	9 1981	10 1982	11 1983	12 1984	13 1985
1 Prior to 1980	11,937	9,796	9,159	9,592	8,945	9,022	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
2 1980	5,917	5,429	3,527	3,434	2,857	2,402	60.6	55.6	36.1	35.2	29.3	24.6
3 Cumulative Total	17,854	15,225	12,686	13,026	11,802	11,424	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
4 1981	XXXX	6,799	5,173	4,765	3,952	4,443	XXXX	84.5	64.3	59.2	49.1	55.2
5 Cumulative Total	XXXX	22,024	17,859	17,791	15,754	15,867	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
6 1982	XXXX	XXXX	6,899	4,003	3,782	3,285	XXXX	XXXX	112.3	65.2	61.6	53.5
7 Cumulative Total	XXXX	XXXX	24,758	21,794	19,536	19,152	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
8 1983	XXXX	XXXX	XXXX	3,599	3,678	2,829	XXXX	XXXX	XXXX	60.1	61.5	47.3
9 Cumulative Total	XXXX	XXXX	XXXX	25,393	23,214	21,981	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
10 1984	XXXX	XXXX	XXXX	XXXX	4,295	3,360	XXXX	XXXX	XXXX	XXXX	65.1	50.9
11 Cumulative Total	XXXX	XXXX	XXXX	XXXX	27,509	25,341	XXXX	XXXX	XXXX	XXXX	XXXX	XXXX
12 1985	XXXX	XXXX	XXXX	XXXX	XXXX	7,008	XXXX	XXXX	XXXX	XXXX	XXXX	75.7

SCHEDULE P—PART 3—PRODUCTS LIABILITY

Calendar Year Premiums Earned, Accident Year Loss and Loss Expense Incurred

	Dollars (000 omitted)							Percentages						
	1 1979	2 1980	3 1981	4 1982	5 1983	6 1984	7 1985	8 1979	9 1980	10 1981	11 1982	12 1983	13 1984	14 1985
	Summary Data from Schedule P—Part 2													
1 Premiums Earned	9,055	9,768	8,050	6,144	5,984	6,598	9,256	100.0	100.0	100.0	100.0	100.0	100.0	100.0
2 Loss & Loss Exp. Inc'd	1,860	2,402	4,443	3,285	2,829	3,360	7,008	20.5	24.6	55.2	53.5	47.3	50.9	75.7
	Loss & Loss Expense through 1 year													
3 Paid	123	246	486	286	431	308	(57)	1.4	2.5	6.0	4.6	7.2	4.7	(0.6)
4 Reserve (2) – (3)	1,737	2,156	3,957	3,001	2,398	3,052	7,065	19.2	22.1	49.2	48.8	40.1	46.3	76.3
	Loss & Loss Expense through 2 years													
5 Paid	238	598	601	621	665	438	XX	2.6	6.1	7.5	10.1	11.1	6.6	XX
6 Reserve (2) – (5)	1,622	1,804	3,842	2,664	2,164	2,922	XX	17.9	18.5	47.7	43.4	36.2	44.3	XX
	Loss & Loss Expense through 3 years													
7 Paid	426	646	894	996	1,132	XX	XX	4.7	6.6	11.1	16.2	18.9	XX	XX
8 Reserve (2) – (7)	1,434	1,756	3,549	2,291	1,697	XX	XX	15.8	18.0	44.1	37.3	28.4	XX	XX
	Loss & Loss Expense through 4 years													
9 Paid	693	959	1,530	1,345	XX	XX	XX	7.7	9.8	19.0	21.9	XX	XX	XX
10 Reserve (2) – (9)	1,167	1,443	2,913	1,942	XX	XX	XX	12.9	14.8	36.2	31.6	XX	XX	XX
	Loss & Loss Expense through 5 years													
11 Paid	960	1,357	1,621	XX	XX	XX	XX	10.6	13.9	20.1	XX	XX	XX	XX
12 Reserve (2) – (11)	900	1,045	2,822	XX	XX	XX	XX	9.9	10.7	35.1	XX	XX	XX	XX

STATISTICAL COUNTRYWIDE RESULTS FOR SELECTED COMMERCIAL LIABILITY CLASSES

This report provides statistical data reported to ISO for selected liability classes identified as experiencing availability and affordability problems.

April, 1986

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ATTACHMENT ONE

Description of the Contents of the Exhibits

Each attached exhibit presents the countrywide statistical data of one group of risks. The experience of both monoline and package policies written under ISO programs or essentially similar programs is included. These exhibits separately compile the five most recent policy years (years ending December 31, 1980 through 1984), and show five-year totals.

Only Owners, Landlords and Tenants Bodily Injury Liability or Liquor Liability experience reported to ISO under the ISO Commercial Statistical Plan (CSP) and the intermediate level of the Commercial Minimum Statistical Plan (CMSP) is included. This includes the experience of all ISO reporting companies except for the very smallest which may elect to report under the mini level of CMSP. The specific ISO class codes used are listed on each exhibit.

Total Limits Earned Premium is the actual premiums collected for policies in the indicated policy years. These premiums are not adjusted for ratemaking considerations such as subsequent rate changes, or to eliminate the effect of package or other rating modifications.

Incurred Losses are the actual losses paid for the policies plus the reserves for unpaid losses as of March 31, 1985. The losses have been adjusted to ultimate settlement level using the countrywide loss development factors for OL&T manual ratemaking classes. These factors adjust primarily for the later emergence of claims that had not been reported by March 31, 1985. The losses were also adjusted to include unallocated loss adjustment expenses, based on the standard factor developed from all General Liability experience. Any deviations from these average values will result in inaccuracies in the estimated ultimate values of losses and loss adjustment expenses. Losses have not been adjusted for subsequent changes in cost levels.

Basic Limits Incurred Losses include the first $25,000 of each loss, and all loss adjustment expenses. Excess Limits Incurred Losses are that part of each loss in excess of $25,000, but do not include loss adjustment expenses.

The Number of Incurred Claims are reported claims adjusted to ultimate settlement levels based on development factors derived from the countrywide experience of OL&T manual ratemaking classes.

The Loss and Loss Adjustment Expense Ratio compares the total limits incurred losses and loss adjustment expenses with the total limits collected earned premiums. This ratio calculates the dollars of losses and loss adjustment expenses incurred per dollar of premium collected. The ratio has not been adjusted to include company operating expenses.

Any analysis that uses the data shown in these attachments must consider the limitations of the data. The reported experience for these classes is often quite limited so the credibility of the results must be carefully examined.

Data for these classes are also available on a state basis. The state data are directly comparable to the countrywide. Because of the smaller volume, credibility is a more important consideration when examining data from a single state than when the data are considered on a countrywide basis. Distortions in the state data may also occur because of the absence from the ISO database of the state's major writers of that class. Furthermore, an individual state's data may not yet reflect national trends which will transcend state boundaries, such as landmark court decisions in other jurisdictions.

The experience reported to ISO for these classes does not include all of the market for these types of risks (for example, an insurer that has developed an independent program using a different exposure base or coverage provisions). Similarly, excess or deductible liability insurance cannot be included. Also, some carriers, such as the excess and surplus lines carriers that have written much of the liquor liability market, do not report statistics to ISO. Because of these exclusions, the experience reported here may not be representative of the entire market.

INSURANCE SERVICES OFFICE, INC.

ATTACHMENT TWO
SHEET 1

GENERAL LIABILITY INSURANCE
ALL OWNERS, LANDLORDS AND TENANTS CLASSES
MONOLINE AND MULTILINE COMBINED

Owners, Landlords and Tenants includes coverage arising from liability claims for bodily injury and medical payments arising out of the ownership, maintenance or use of the covered premises and incidental operations. The remaining sections in this report, except for Liquor Liability, detail specific classifications of OL&T.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 502,589,481	$ 318,541,483	$ 138,366,733	57,680	90.9%
12/31/81	652,083,610	450,110,341	218,620,521	76,396	102.6%
12/31/82	719,568,955	600,871,615	271,239,890	99,611	121.2%
12/31/83	774,480,450	683,155,842	352,750,271	104,405	133.8%
12/31/84	762,267,289	743,521,608	436,313,901	106,307	154.8%
TOTAL	$3,410,989,785	$2,796,200,889	$1,417,291,316	444,399	123.5%

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INSURANCE SERVICES OFFICE, INC.

ATTACHMENT TWO
SHEET 2

GENERAL LIABILITY INSURANCE
MUNICIPAL CLASSES*
MONOLINE AND MULTILINE COMBINED

This exhibit includes all OL&T classes that are strictly municipal in nature. Sheet 2A summarizes particular groups of municipal classes. Their experience is also included here. Certain exposures, such as housing projects, bus stations and bridges are excluded from these classes, and are shown in a separate exhibit on Sheet 3.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 35,296,627	$ 31,251,906	$ 15,719,085	4,390	133.1%
12/31/81	57,007,556	48,984,959	30,810,927	6,460	140.0%
12/31/82	66,407,102	67,818,339	39,395,319	8,527	161.4%
12/31/83	78,059,122	96,319,947	69,406,579	11,630	212.3%
12/31/84	67,692,458	100,755,095	73,688,299	12,125	257.7%
TOTAL	$304,462,865	$345,130,246	$229,020,209	43,132	188.6%

*Classes Included

82113	Public High Schools or Junior Colleges
82116	Schools - Not otherwise classified
91250 - 91263	Governmental Subdivisions
92151 92153 93151	Streets and Roads
93050	Governmental Composite Rated Risks
93111	Government Employees
93155	Play Streets
93164	Municipal Permits
93221	Elementary, Kindergarten or Junior High Schools - Public

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INSURANCE SERVICES OFFICE, INC.

ATTACHMENT TWO
SHEET 2A

GENERAL LIABILITY INSURANCE

STREETS AND ROADS (CLASSES 92151, 92153 AND 93151)
MONOLINE AND MULTILINE COMBINED

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 6,874,941	$10,080,648	$ 5,124,326	1,307	221.2%
12/31/81	7,538,187	14,461,824	8,575,478	1,654	305.6%
12/31/82	7,328,564	17,623,471	13,505,009	1,818	424.8%
12/31/83	6,660,170	17,677,843	16,507,406	1,921	513.3%
12/31/84	5,652,493	17,063,631	13,603,390	1,868	542.5%
TOTAL	$34,054,355	$76,907,417	$57,315,609	8,568	394.1%

PUBLIC SCHOOLS (CLASSES 82113, 82116, AND 93221)
MONOLINE AND MULTILINE COMBINED

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$12,336,307	$ 10,440,549	$ 3,600,852	1,807	113.8%
12/31/81	17,130,091	15,196,239	7,081,218	2,595	130.0%
12/31/82	19,234,384	19,856,327	7,124,042	3,106	140.3%
12/31/83	26,392,414	36,820,657	22,929,399	4,844	226.4%
12/31/84	24,262,371	39,908,778	23,557,466	5,100	261.6%
TOTAL	$99,355,567	$122,222,550	$64,292,977	17,452	187.7%

GOVERNMENTAL SUBDIVISIONS (CLASSES 91250 - 91263)
MONOLINE AND MULTILINE COMBINED

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/81	$13,966,938	$ 8,076,986	$ 6,877,043	886	107.1%
12/31/82	26,561,019	18,588,450	10,916,487	2,236	111.1%
12/31/83	29,064,201	25,595,258	16,304,092	3,079	144.2%
12/31/84	25,970,257	31,446,300	24,746,253	3,627	216.4%
TOTAL	$95,562,415	$83,706,994	$58,843,875	9,828	149.2%

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INSURANCE SERVICES OFFICE, INC.

ATTACHMENT TWO
SHEET 3

GENERAL LIABILITY INSURANCE
MUNICIPAL RELATED CLASSES*
MONOLINE AND MULTILINE COMBINED

These classes are for exposures not included in the Governmental Subdivisions classes, but that may involve municipal functions. Any private facilities rated under these classes are also included here.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 2,713,060	$ 2,047,952	$ 2,138,636	308	154.3%
12/31/81	3,152,971	2,038,694	2,120,460	389	131.9%
12/31/82	3,634,554	2,946,540	612,034	545	97.9%
12/31/83	3,689,628	3,371,102	2,559,962	535	160.7%
12/31/84	3,732,128	3,961,326	2,089,123	619	162.1%
TOTAL	$16,922,341	$14,365,614	$ 9,520,215	2,396	141.1%

*Classes Included

41711	Bus Stations or Terminals	91188	Housing Projects
44631	Wharf or Waterfront Property	91231	
44632		92181	
44633		92182	
44639		92184 - 92187	
45836	Airports	93181	
47841	Toll Bridges	93182	
47850	Drawbridges	93184	
92154	Highways or Roads or Dept. of Public Works	93185	
93131	Firehouses		

INSURANCE SERVICES OFFICE, INC.

ATTACHMENT TWO
SHEET 4

GENERAL LIABILITY INSURANCE
RECREATIONAL CLASSES
MONOLINE AND MULTILINE COMBINED

These classes are for recreational facilities and events such as amusement parks, grandstands, ski lifts and fireworks demonstrations. They may be municipal or private. The 88 actual class codes are too numerous to list here.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 39,270,579	$ 25,350,520	$10,003,986	5,367	90.0%
12/31/81	49,376,922	31,904,007	13,858,365	5,931	92.7%
12/31/82	56,875,885	42,194,290	16,164,611	8,448	102.6%
12/31/83	58,921,287	50,406,642	25,203,624	8,687	128.3%
12/31/84	60,226,085	55,204,772	34,009,622	8,284	148.1%
TOTAL	$264,670,758	$205,060,231	$99,240,208	36,717	115.0%

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ATTACHMENT TWO
SHEET 5

GENERAL LIABILITY INSURANCE
DAY NURSERIES (CLASS 82115)
MONOLINE AND MULTILINE COMBINED

This exhibit includes experience under the OL&T Day Nurseries classification. This class is institutional day care operations, i.e., when day care is the primary function of the business. This experience does not include day care which is provided out of an individual's home and has been deemed by the underwriter to be an "incidental business exposure" according to the rules of the Homeowners Policy and covered there.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 1,785,529	$ 1,013,414	$ 268,671	254	71.8%
12/31/81	2,581,645	1,199,095	1,139,122	336	90.6%
12/31/82	3,321,139	2,026,196	1,597,703	462	109.1%
12/31/83	4,016,915	3,073,908	2,430,769	612	137.0%
12/31/84	4,586,601	4,455,600	3,331,254	840	169.8%
TOTAL	$16,291,829	$11,768,213	$8,767,519	2,504	126.0%

INSURANCE SERVICES OFFICE, INC.

ATTACHMENT TWO
SHEET 6

GENERAL LIABILITY INSURANCE
LIQUOR LIABILITY*
MONOLINE AND MULTILINE COMBINED

For states where liquor liability is imposed by statute or under common law principles, these classes include: clubs, package stores selling alcoholic beverages for off-premises consumption, manufacturers, wholesalers and distributors, restaurants, taverns, hotels and motels, temporary licensees, and owners or lessors of premises used by others in the business of manufacturing, distributing, selling or serving alcoholic beverages. Data from states that do not impose liquor liability by statute or under common law are also included.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 8,946,430	$ 1,917,279	$ 1,942,659	127	43.1%
12/31/81	11,595,663	3,172,391	2,690,031	195	50.6%
12/31/82	18,159,662	5,878,950	6,497,060	396	68.2%
12/31/83	14,169,075	3,526,863	4,412,736	273	56.0%
12/31/84	10,797,671	3,728,887	5,182,816	302	82.5%
TOTAL	$63,668,501	$18,224,370	$20,725,302	1,293	61.2%

* Classes Included: 50881, 50882, 58151, 58161, 58168, 58169, 58191, 58198, 58199, 50911 ,59211, 59212, 70113, 70114, 70411, 70412, 70413, 70414, 70415, 70416

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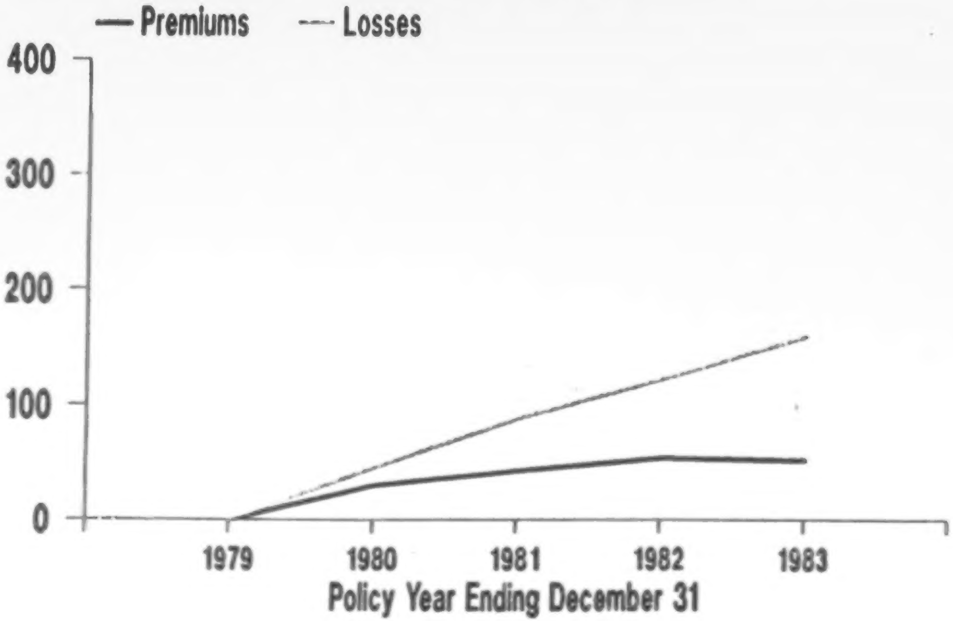
ATTACHMENT THREE
SHEET 1

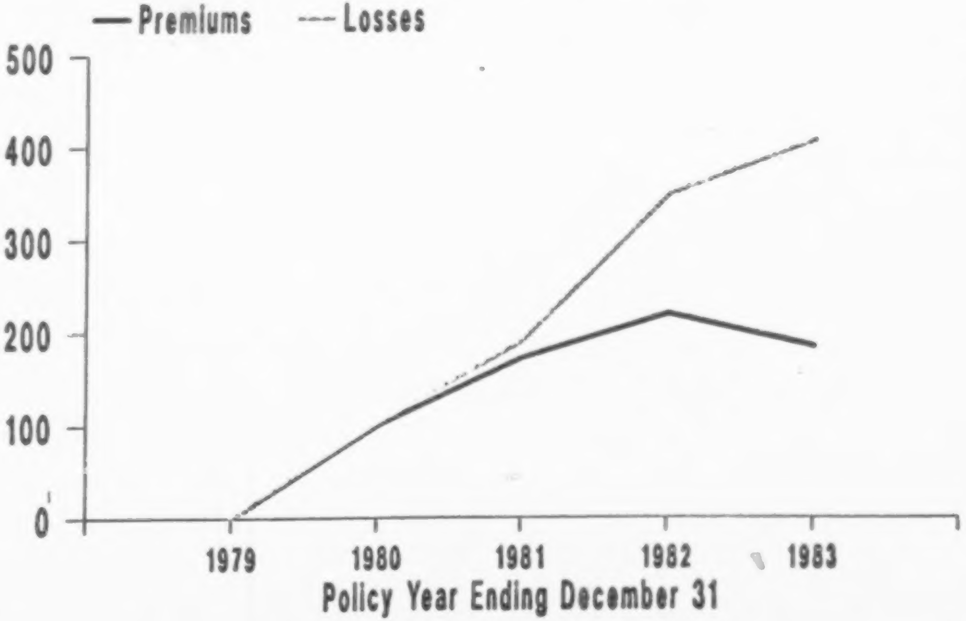
All Owners, Landlords and Tenants Classes
Growth in Premiums and Losses (%) as Reported to ISO



ATTACHMENT THREE
SHEET 2

All Municipal Classes

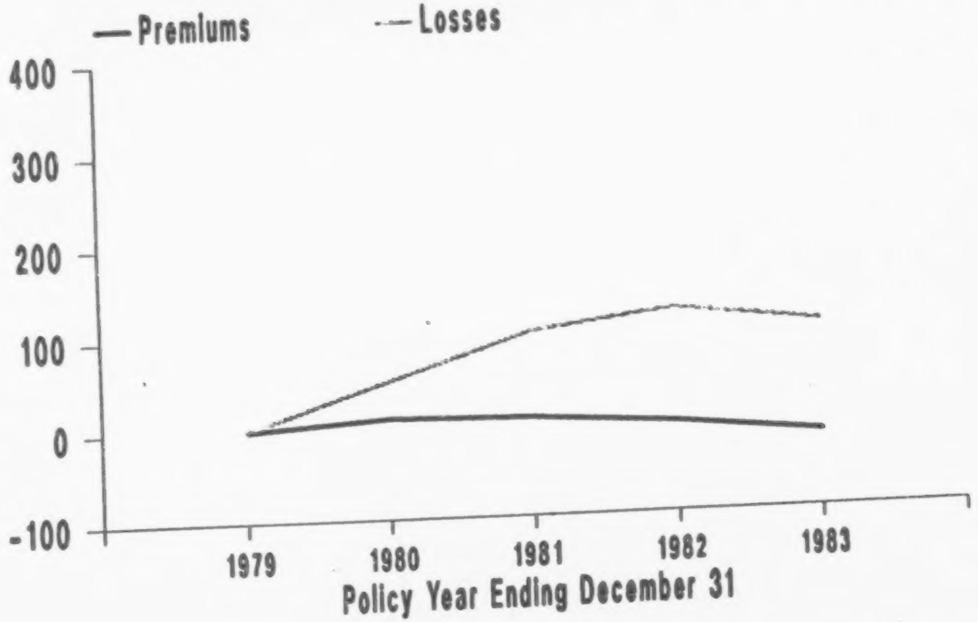
Growth in Premiums and Losses (%) as Reported to ISO



ATTACHMENT THREE
SHEET 3

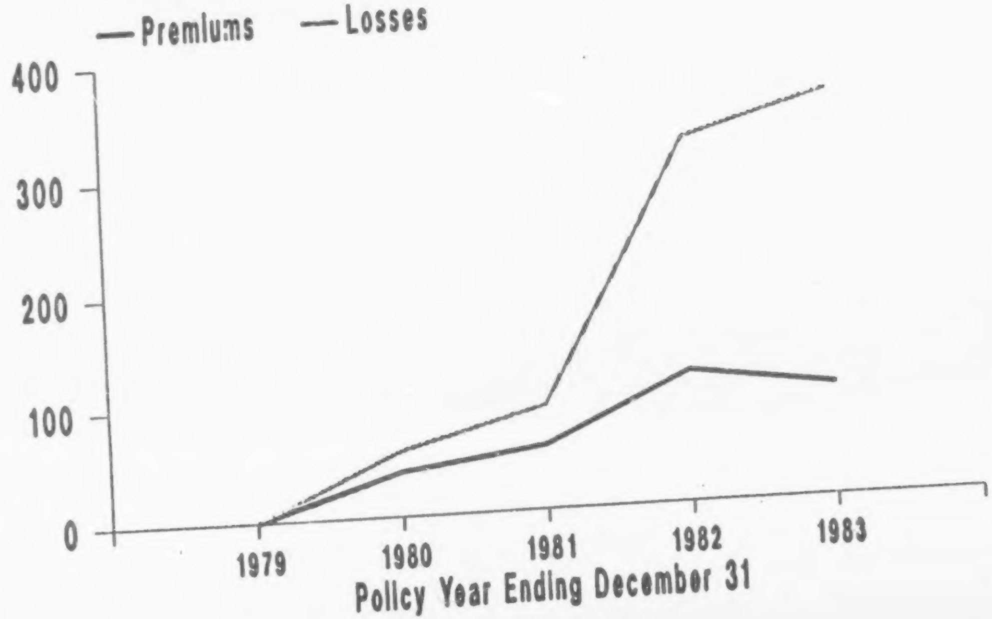
Streets and Roads

Growth in Premiums and Losses (%) as Reported to ISO



ATTACHMENT THREE
SHEET 4

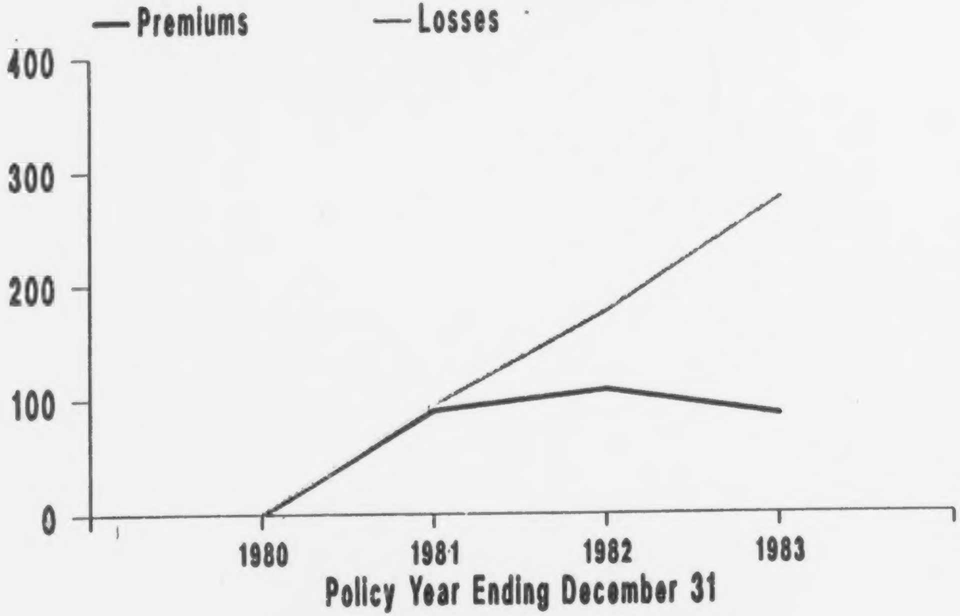
Public Schools
Growth In Premiums and Losses (%) as Reported to ISO



ATTACHMENT THREE
SHEET 5

Governmental Subdivisions

Growth in Premiums and Losses (%) as Reported to ISO

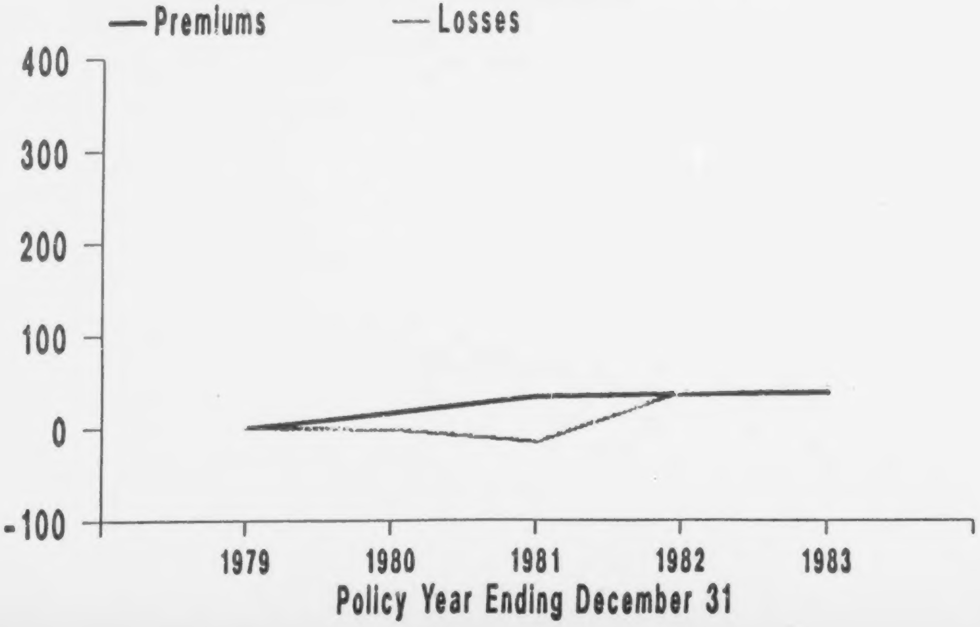


Insufficient data for policy year ended December 31, 1979.

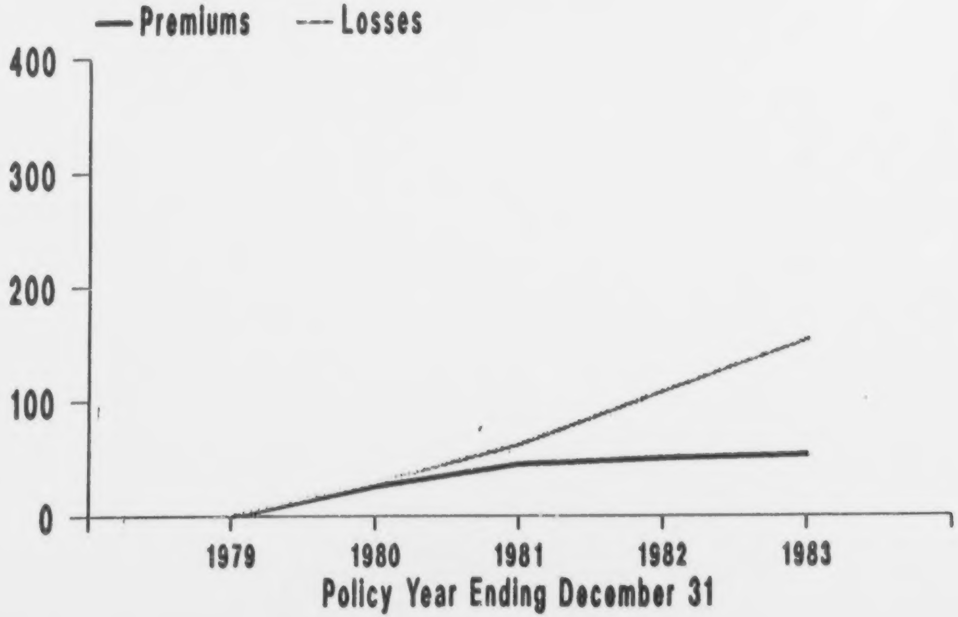
ATTACHMENT THREE
SHEET 6

Municipal Related Classes

Growth In Premiums and Losses (%) as Reported to ISO



ATTACHMENT THREE
SHEET 7



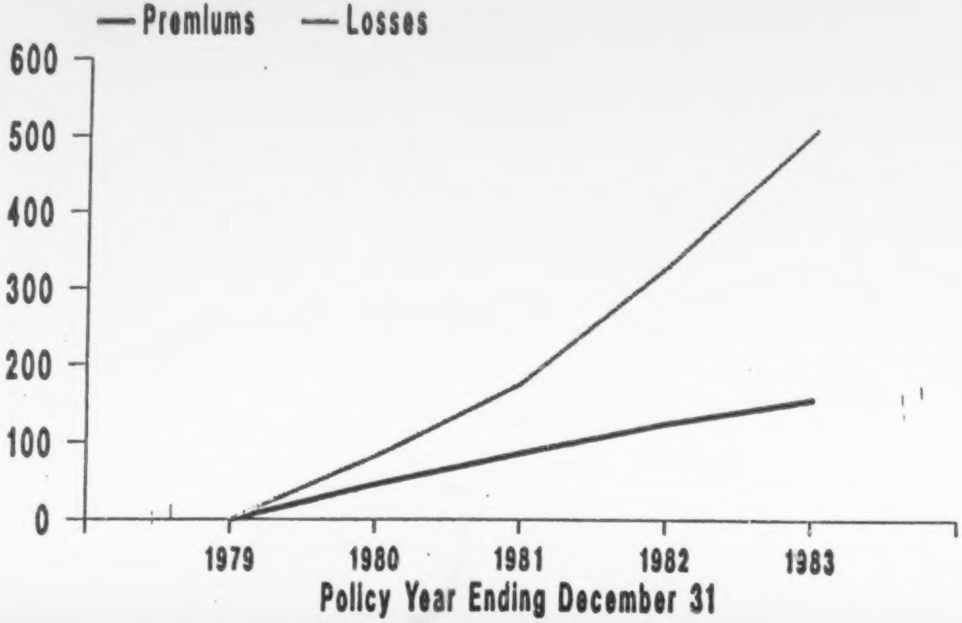
Recreational Classes

Growth in Premiums and Losses (%) as Reported to ISO

ATTACHMENT THREE
SHEET 8

Day Nurseries

Growth in Premiums and Losses (%) as Reported to ISO



ATTACHMENT THREE
SHEET 9

Liquor Liability

Growth in Premiums and Losses (%) as Reported to ISO

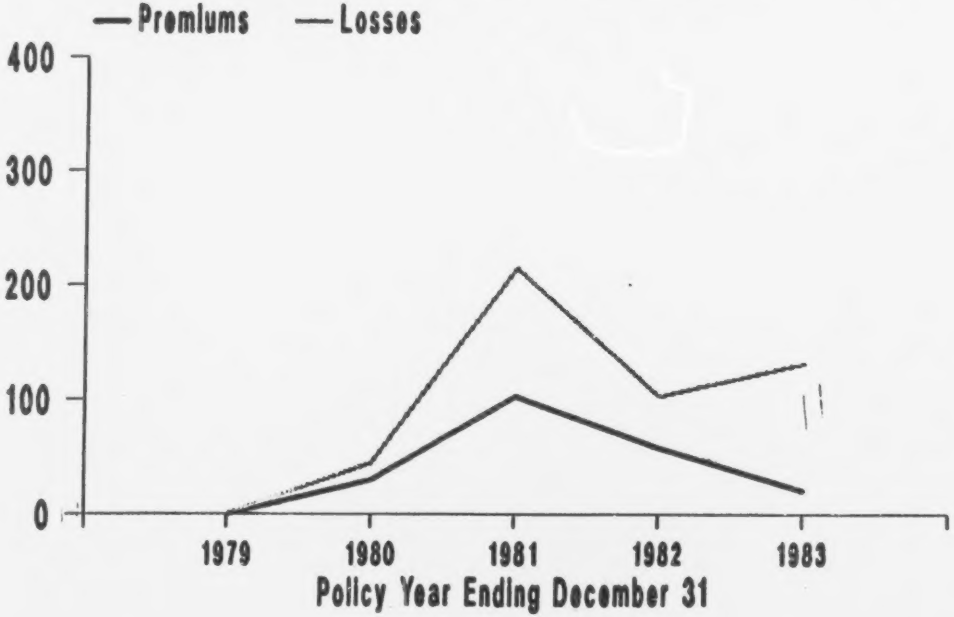


Exhibit 7

INSURANCE SERVICES OFFICE, INC.

GENERAL LIABILITY INSURANCE
COUNTRYWIDE
MONOLINE AND PACKAGE BUSINESS

ALL PRODUCTS AND COMPLETED OPERATIONS BODILY INJURY LIABILITY

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED INCURRED LOSS & LAE	PAID LOSS & ALLOC LAE	OUTSTANDING LOSS & ALLOC LAE	UNALLOCATED LAE	NUMBER INC. CLAIMS	INC. LO & LAE RATIO
12/31/75	58,631,597	192,644,676	147,331,905	31,042,795	14,269,976	24,999	3.28
12/31/76	92,102,357	191,509,011	134,914,062	42,409,096	14,185,853	17,781	2.07
12/31/77	174,610,575	198,549,680	121,982,727	61,859,569	14,707,384	15,922	1.12
12/31/78	283,382,301	247,092,595	132,639,691	96,149,749	18,303,155	13,700	0.87
12/31/79	325,274,469	404,110,530	169,716,959	204,459,504	29,934,117	16,816	1.24
12/31/80	378,511,360	317,491,637	149,367,952	144,585,786	23,517,899	22,576	0.83
12/31/81	386,454,600	456,948,669	181,054,589	242,046,030	33,848,050	24,164	1.18
12/31/82	352,593,805	389,537,542	92,412,175	268,270,734	28,854,633	25,258	1.10
12/31/83	302,999,977	382,542,846	53,135,308	301,071,031	28,336,507	23,256	1.26
12/31/84	311,540,275	476,809,967	21,938,141	419,552,477	35,319,249	24,399	1.53
TOTAL	2,666,001,318	3,257,237,103	1,204,513,509	1,811,446,772	241,276,822	208,871	1.22

Exhibit 8

INSURANCE SERVICES OFFICE, INC.

GENERAL LIABILITY INSURANCE
COUNTRYWIDE
MONOLINE AND PACKAGE BUSINESS

ALL PRODUCTS AND COMPLETED OPERATIONS PROPERTY DAMAGE LIABILITY

POLICY YEAR ENDING	TOTAL LIMITS EARNED PREMIUMS	DEVELOPED INCURRED LOSS & LAE	PAID LOSS & ALLOC LAE	OUTSTANDING LOSS & ALLOC LAE	UNALLOCATED LAE	NUMBER INC. CLAIMS	INC. LOS & LAE RATIO
12/31/75	35,965,739	34,661,654	27,989,348	4,104,776	2,567,530	12,039	0.964
12/31/76	61,496,059	38,817,942	30,207,607	5,734,932	2,875,403	11,168	0.631
12/31/77	99,975,436	47,488,473	32,441,090	11,529,718	3,517,665	10,203	0.475
12/31/78	147,517,654	86,057,231	60,989,511	18,693,110	6,374,610	12,472	0.583
12/31/79	167,990,037	89,066,490	55,970,985	26,498,087	6,597,518	12,116	0.530
12/31/80	203,566,310	133,643,109	69,935,812	53,907,807	9,899,490	13,539	0.657
12/31/81	248,668,037	136,416,916	62,872,778	63,439,181	10,104,957	15,047	0.549
12/31/82	245,769,512	179,874,481	61,340,741	105,209,704	13,324,036	18,369	0.732
12/31/83	215,018,331	174,393,185	43,892,177	117,582,994	12,918,014	18,526	0.811
12/31/84	214,568,642	210,556,915	32,816,154	162,143,952	15,596,809	23,876	0.981
TOTAL	1,640,535,757	1,130,976,396	478,356,103	568,844,264	83,776,029	147,355	0.689

Paid losses and allocated LAE are as of 3/31/85.

Senator SIMON. Thank you.
Mr. Riley.

STATEMENT OF R.C. RILEY

Mr. RILEY. Thank you, Mr. Chairman. Good morning. My name is R.C. Riley, and I am an independent insurance agent in Benton, KY. I am here today representing the Independent Insurance Agents of America. As a member of IIAA's executive committee and chairman of that association's pollution task force, I believe that I speak with firsthand knowledge and experience regarding the present problems facing both people in need of product liability insurance as well as the companies desiring to offer such coverage.

Being from Kentucky, I want to go on record that it is my perception that the vast majority of our citizens are delighted and pleased that Senator McConnell, one of our two distinguished Senators, is taking a lead role in bringing to national attention the issue that in some way affects and touches the lives of each citizen in this country. Kentuckians, and I suspect most citizens of this country, realize that, as average citizens, we have a vested interest in correcting a system that is vital to the long-term health and stability of our society.

There is no question that tort reform is a necessary factor in the effort to return an available, affordable insurance market to the American public.

The focus of the debate on Capitol Hill today is an important one—the need for national uniformity in the product liability law.

IIAA commends the efforts of the Senate Commerce Committee for a job well done. Independent agents have seen first hand how necessary this tort reform has become. Quite different from a move for Federal reform of the civil justice system, changes in the product liability law have been proven necessary. This is evident because, unique to product cases, a majority of the claims involve interstate commerce. The differing laws in each state leave defendants with an unpredictable liability exposure. This lack of uniformity has contributed to the shortage of affordable product liability coverage.

I hear the critics cry that tort reform is not the answer, and I see insurance companies checking their bottom line and the trial lawyers checking their wallets. But this debate is not about them, it is about opportunity and fairness, the opportunity for a toymaker to sell his creation, for a pharmaceutical manufacturer to market a medicine, or for a sporting goods company to manufacture a new football helmet. And it is about fairness, for a person to receive adequate compensation if he is harmed as a result of a defective product or through the negligence of a manufacturer in either the design, production, or failure to warn of known dangers associated with the product.

The fear of lawsuit has stifled the American ingenuity. Inventors, scientists, and manufacturers are fearful of creating and insurers are fearful of covering. It is time for reform.

I do not champion tort reform as the only answer. I have seen the influences in the marketplace and can tell you that the civil justice system is not the only factor in this drama. So, too, it is not the only solution. Just as in the availability and affordability shortage of commercial liability coverage, the product liability situation has three distinct causes:

First, is the well-documented cash flow underwriting in the times of high interest rates; second, poor risk management loss prevention techniques on the part of commercial operations; and, third, the unpredictable nature of the Nation's civil justice system which has been addressed, in part, by the Product Liability Reform Act before this committee today. Efforts to ease the liability crunch need to come from all three areas, not just one.

In numerous statements delivered by members of my association during hearings on the liability crisis, this three-pronged approach has been strongly espoused. Now, while two of the three factors have undergone reform and the third has yet to be enacted, the press is reporting an end of the crisis. As an insurance agent, I am encouraged but far from confident.

On a sinking boat, Mr. Chairman, simply bailing out the water is not going to keep you afloat. The leak needs to be plugged because you are sure to sink again.

The early press reports of the insurance market's return to buoyancy is a good sign that the efforts by the industry to return to sound underwriting and pricing practices, coupled with vigorous loss prevention activities by commercial underwriters, have met with some success. The water is being bailed out, yet the leak remains. The crisis will return and continue if the root cause of the problem, tort reform, is not addressed in a satisfactory manner.

The Independent Insurance Agents of America believes that in the area of product liability, S. 2760 is a commendable step.

The insurance industry is working on opening up lines and providing affordable rates through better management policies. Yet, certain liability exposures are so onerous in some instances that special insurance contracts needed to be instituted in order to provide the insurers with some degree of measurability.

Senator SIMON. Can you summarize the balance of your statement?

Mr. RILEY. I am nearly complete, Senator, if I may just have another moment.

The businesses in need of commercial liability coverage have also been working toward obtaining affordable policies by carefully scrutinizing their risks and making improvements where necessary. Yet, under today's standards, these businesses may still be found liable even in cases where they are not at fault. Or, in cases where they have been found 25 percent liable, it is possible that 100 percent liability may be assessed. To most citizens in this country, that is not a fair situation.

Because of the interstate nature of product liability exposures, the time for Congress to enact legislation reforming product liability law has come. If affordable coverage is to become available for product liability, a uniform standard of law is necessary, a uniform law which incorporates fairness, where liability is fault based and fairly apportioned, while at the same time ensuring just compensation for injured parties.

With the incorporation of Senator Kasten's amendment and the amendment to eliminate joint and several liability, the Product Liability Reform Act, as passed by the Senate Commerce Committee, would bring both fairness and equity to the Nation's product liability law.

Thank you, and I will be happy to try to answer any questions that you might have.

Senator SIMON. Thank you.

Mr. Angoff.

STATEMENT OF JAY ANGOFF

Mr. ANGOFF. Thank you, Mr. Chairman. I am Jay Angoff. I am counsel to the National Insurance Consumer Organization and I am very grateful for the opportunity to testify here today.

I would like to make four points briefly and then allude to your points about data collection and the antitrust exemption for the insurance industry.

The first point is linkage. I think the evidence overwhelmingly shows that, whatever we think about the tort system or the way insurance is regulated today, there is no linkage between refusals to deal by insurance companies in large premium increases on the one hand and the tort system on the other hand.

I think the way to see that is to look at what has happened in some States where there has been in the law for some time strict limitations on recovery and to look at what has happened to many insureds who have never had a claim against them.

For example, in Pennsylvania there is a very, very restrictive cap on municipal liability. In South Dakota, there is a very restrictive cap on liquor liability. A number of States have either eliminated or substantially modified joint and several liability such as New Mexico and Iowa, yet in these States there is still the identical insurance crisis as there is in the rest of the country. Or, for example, I think a study was cited earlier of day care centers, 97 percent of whom have never had a claim against them, yet study after study has shown that an overwhelming percentage of day care centers in the last 18 months have either had their insurance canceled or face increases of 200, 300, 500 percent and more. So the first point is no linkage.

The second point is even if there were a linkage, you have got to consider fairness, and I think that the reaction to the bill that came out of the Senate Commerce Committee, even during consideration of that bill, showed—and I think fortunately—that within the Senate, even among members who supported that bill, there is just sort of a revulsion to capping compensation for severely injured people at $250,000, which that bill would do. I think that most of us just think it is fundamentally unfair for us, for Congress to tell, or anybody for that matter, to tell someone that the loss of an arm or the loss of the ability to bear children or to go to the bathroom in the normal way or to walk or to talk is worth no more than $250,000. So I think even if a linkage could be demonstrated, that there is a serious question as to whether capping recovery would be fair.

A third point is that there are reforms in the legal system—I do not like to use the words "tort reform," because I do not like the connotation of tort reform, but legal reform is needed, structural legal reform, and by that I mean not limiting compensation to severely injured people, as the product liability bill would do, but, rather, making the system run more efficiently, reducing the costs of the system by such things as limiting fees for both plaintiff's lawyers and defense lawyers, penalizing frivolous suits but also frivolous defenses and objections and motions, alternative dispute resolution systems, mediation, arbitration, minitrials, various types of alternatives to the tort system that would get some of the cases that could be relatively easily resolved out of the tort system so that the tort system could concentrate on what it does best, and these are the types of reforms that I think will save everybody money and get a greater percentage of the dollar flowing through the system to the victim, rather than just limiting recovery for severely injured people.

The fourth point is this: The tort system serves three purposes, not just compensation but also deterrence and disclosure. And to the extent that the tort system is limited, it also limits deterrence and disclosure, so I would think to the extent that Congress wished to limit the tort system it would put in place other mechanisms for deterrence and disclosure such as strict criminal penalties for corporate malfeasance and possibly greater beefing up enforcement and investigative staffs of regulatory agencies, because today we do require the tort system to do quite a bit.

I would like now to allude to your two points: First, data and, second, the antitrust exemption. As far as data is concerned, Mr. Cheek said that you are swimming in data on product liability, and to a certain extent that is true, but you are swimming in data like total limits earned premiums, developed incurred loss and loss adjustment expense, incurred loss and loss adjustment expense ratio. What you are not told is what you and the average person would like to know, which is how much they take in and how much they pay out each year in each State for each type of insurance.

I would suggest that there are four types of data that you do not have today which you absolutely need if product liability reform is to continue to be considered. The first is you have got to find out the difference between how much the jury verdict is and how much is actually paid out.

The Rand Study has done a study—it will come out shortly—which shows that as far as punitive damage verdicts are concerned, only 45 percent of the amount that the jury award is actually paid. That is obviously a huge difference, but you do not have data on that today and you need that.

The second is data on settlements versus verdicts. There is a lot of publicity about verdicts, but not only do you need what the average verdict is but also what the average settlement is.

The third is, if you are considering limiting noneconomic damages, you have got to find out today how much do they pay out in noneconomic damages and how much in economic damages. To illustrate, in the early seventies there was a study of auto insurance done by the Department of Transportation, and that study found, contrary to what you might think, that people who were moderately injured were overcompensated, and people who were seriously injured undercompensated. Well, if the data should show that people injured by defective products seriously are undercompensated, obviously it would make no sense to impose caps on liability.

And the final type of data you need is to evaluate the doctrine of joint and several liability. You have got to find out how often defendants are involved in multiple defendant suits and how often they end up paying more than their allocable share of responsibility. It may be that a case can be made for a change, but you have got to get the data first.

One point about the antitrust exemption, and that is this: Les says they do not fix prices. Well, if they do not fix prices, they do not need the exemption; if they do fix prices, they should not be fixing prices. In either event, the McCarran-Ferguson exemption should be repealed and we strongly support measures in that direction.

Thank you very much.

[The prepared statement of Mr. Angoff follows:]

NATIONAL INSURANCE
CONSUMER ORGANIZATION

TESTIMONY OF

JAY ANGOFF
COUNSEL
NATIONAL INSURANCE CONSUMER ORGANIZATION

I. The assumption on which limiting liability in product liability cases is based -- that increasingly liberal judges and juries have caused insurance rates to skyrocket, and that restricting judges and juries will cause insurance rates to fall -- is false. Exhibit A illustrates that neither the size of jury verdicts nor the percentage of plaintiff's verdicts has escalated in recent years. Exhibits B and C demonstrate that insurance rates skyrocketed during the last 18 months or so -- just as they did in 1975-76 -- because of cash-flow underwriting by insurance companies, not because juries and judges suddenly became generous. Exhibit D demonstrates that the insurance market is beginning to loosen because the insurance cycle has turned, not because of any changes that have or have not been made in the legal system.

II. Even if Congress believed that limiting liability in product liability cases would reduce insurance rates, it would still need to decide whether the benefit of such limitations outweigh their cost. For example, limitations on damages for disfigurement, paralysis and all other pain and suffering contained in the Danforth bill would place a maximum value of $250,000 on permanent disfigurement and on the loss of the ability to walk, to talk, to have children, to have normal sexual relations and to go to the bathroom in the normal way. Even if so valuing such injuries would substantially reduce insurance rates, it is at best unclear whether the benefits of doing so exceed its costs.

III. To the extent Congress legislates any change in the tort system, it should set up alternative systems to ensure that the three purposes served by the tort system -- compensation, deterrence and disclosure -- continue to be adequately served. For example, if Congress decides to limit compensation to injured people through the tort system, it should set up an alternative system that allows injured people to be compensated more efficiently, if in a more limited way. A brief description of such a compensation scheme, which currently operates in New Zealand, is attached as Exhibit E. In addition, to the extent tort liability and thus deterrence and disclosure through the tort system is limited, Congress should establish alternative mechanisms that would further deterrence and disclosure. For example, Congress could establish mandatory severe criminal penalties to deter corporate negligence. It could promote the disclosure of evidence of corporate malfeasance by broadening the Freedom of Information Act and increasing the penalties for its violation, beefing up investigative and enforcement staffs at regulatory agencies, and prohibiting the parties to a lawsuit from entering into secrecy agreements.

Exhibit A

What Jury Verdict Research, Inc.'s Statistics Show --According to JVR's Chairman

from "Focusing on the
Facts of the Insurance Crisis,"
a Report to the House
Subcommittee on Economic
Stabilization, by Philip J.
Hermann, Chairman of the Board,
Jury Verdict Research, Inc.
August 6, 1986

I. On whether the average jury verdict has been increasing dramatically

"Our studies do not support any claim of recently escalating jury awards." (2) */

II. On whether plaintiffs are winning in court more often today than in the past

"Even in cases of liability, the similarity over the years is astounding. Overall, 26 years ago, 60% of the verdicts were for the plaintiff. A few hours ago a new calculation was made. It is still 60%. Given almost any liability circumstance, the jury verdict award is generally comparable today to what it was 26 years ago." (20)

III. On whether the median or the average is a better indicator of verdict trends

"Midpoint verdicts .. are a far more meaningful and valid indication of award trends [than average verdicts]." (3)

IV. On whether jury verdicts accurately reflect actual payouts by insurance companies

"It is obvious that JVR figures regarding the average jury verdict can only in a minority of insurance settlements be equated with the amounts actually paid out in claims by insurers." (19)

"Many of the very high verdicts used in our averages, as well as those cited, may have been decreased by the Courts and/or through settlement negotiation." (15)

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*/ page numbers in parentheses.

V. On whether JVR statistics and verdicts have been distorted by the media

"A number of highly publicized news articles quoting our statistics have grossly misstated them." (2)

"The problem is not that jurors are out of control or, with exceptions, make ridiculous awards, but the problem is the effect that newspaper reports of very high verdicts, which may or may not be justified by the facts, have upon the public, the lawyers, and the insurance carriers." (21)

"Even though the verdicts are subsequently reduced or reversed they seldom get media attention. If they do, they rarely rate the headlines of the large verdict." (21)

Exhibit B

PROPERTY/CASUALTY INDUSTRY PERFORMANCE, 1976-1983

All Property/Casualty Operations

Year	Earned Premiums	Rate of Return
1976	$ 56.2 B	14%
1977	68.8	22
1978	79.6	18
1979	89.1	16
1980	95.3	16
1981	97.1	14
1982	102.9	9
1983	107.6	8
Average		15%

Commercial Liability

Year	Earned Premiums	Rate of Return
1976	$4.2 B	27%
1977	5.9	39
1978	7.3	27
1979	7.9	26
1980(*)	8.0	23
1981	7.4	15
1982	6.6	3
1983	6.7	-2
Average		19%

Source: National Association of Insurance Commissioners Report on Profitability, by Line, by State.

Rate of return calculated by multiplying operating profit, as reported by NAIC, by 2, and then adding in investment income on surplus at an assumed after-tax yield as follows: 1976, 5.0%; 1977, 5.5%; 1978, 6.0%; 1979, 6.5%; 1980, 7.0%; 1981, 7.5%; 1982, 8.0%; 1983, 8.5%.

(*) Note: Had p/c insurers not cut premiums after 1980 but had merely held them constant, their rate of return on net worth would have been:

1981: 29% 1982: 37% 1983: 31% 8-year average: 30%

Exhibit C

THE INSURANCE INDUSTRY CYCLE

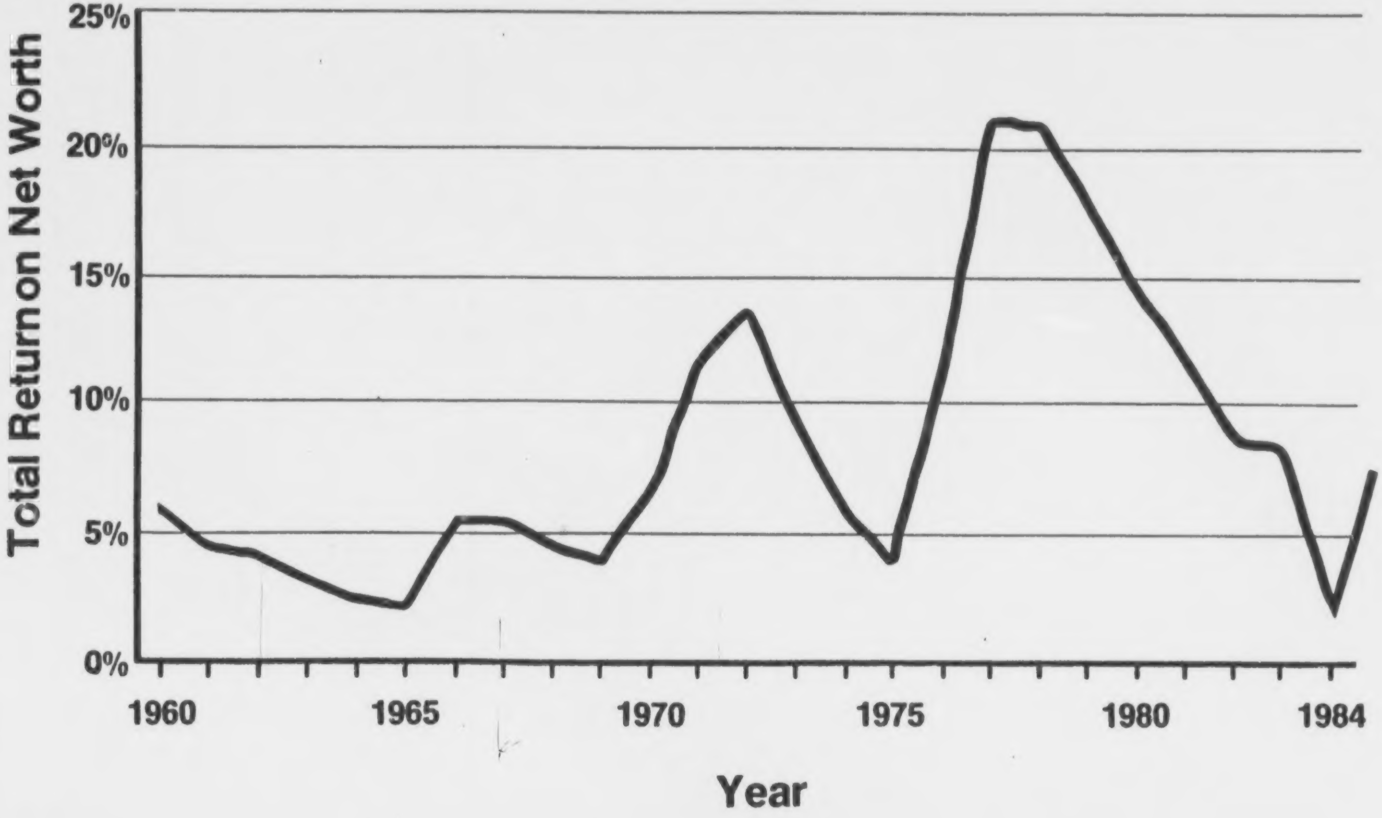

Exhibit D

The Loosening of the Insurance Market

As the industry's profitability for the first half of 1986 would indicate, the insurance cycle has now turned: insurance companies are re-entering markets they had withdrawn from, and in some areas prices are even beginning to come down. Although a few insurance executives have suggested that the insurance market is loosening in response to "tort reform," a survey of insurance departments in states that have enacted no "tort reform" indicates that the insurance market is loosening substantially in the no-tort-reform states:

Number of states surveyed with no tort reform:	13
States in which insurers are re-entering markets they had withdrawn from:	10 (AR, AZ, DE, DC, GA, NJ, OR, SC, TN, VA)
States in which insurers are re-entering markets and beginning to cut prices:	2 (AR, AZ)
States in which market has not yet eased:	3 (KY, MS, MT)

"Tort reform" is defined to include (1) capping pain and suffering, (2) limiting punitive damages, (3) limiting joint and several liability, (4) limiting plaintiff's lawyers fees but not defense lawyers' fees, (5) modifying the collateral source rule, and (6) mandating periodic payments. None of the states surveyed have enacted any of these "reforms." About a dozen other states, including Ohio, Pennsylvania and Texas, have also enacted no tort reform. Most states that did enact some "tort reform" enacted relatively insubstantial "reforms" and like New York linked them to insurance reform, or like Florida and Hawaii expressly linked "tort reform" to insurance rate rollbacks.

On the other hand, three states -- Colorado, Connecticut and Washington -- enacted virtually the entire insurance industry program.

Insurance Market Conditions in Some No-Tort-Reform States, August 1986

State	Tort Reform enacted?	Condition of Insurance Market	Source
Arkansas	None (Legislature not in session)	"Not only has availability improved sharply, but prices are dropping in some lines. Availability is easing across the board, except for pollution."	Conversation with Insurance Commissioner Robert M. Eubanks, August 5, 1986
Arizona	None (vetoed by governor)	"The market is easing for property and short-tail liability lines. There are still some tough lines, but there is nothing that can't get placed. Medical malpractice insurance was never a serious problem. For every line there are at least two companies willing to write insurance. There is also an easing of pricing, even to the extent of a few inadequate rates."	Conversation with Insurance Commissioner David Childers, August 19, 1986
Delaware	None	"We have a market assistance plan, which has only received 3 applications. The inquiries indicate that there is no crisis. Day care is readily placed. Only pollution is difficult. Certainly, now there's no crisis."	Conversation with Insurance Department Official Mike Comegys, August 20, 1986
District of Columbia	None	"We never had any real crisis here. There were problems. Current profits for the industry are substantial. Some people who passed laws may feel they overreacted. Price is a	Conversation with Deputy Insurance Commissioner James Montgomery, August 20,

		problem, but I expect easing once profit information gets out. The companies are like sheep."	1986
Georgia	None	"The market is easing. There are far fewer complaints. The tough lines are pollution and a few others. Directors and officers is now available. Regarding price, increases have slowed down. But we don't know how the credits are moving."	Conversation with Insurance Department Rate Analyst Greg Hawkins, August 19, 1986
Kentucky	None	"There are still problems, particularly with speciality risks, pollution, medical malpractice and amusement parks. There is no general easing."	Conversation with Insurance Department Official Vernon Johnson, August 19, 1986
Mississippi	None (limit on punitive damages vetoed by governor)	"There is no general easing yet. There is a problem in rural and hurricane risks."	Conversation with Insurance Commissioner George Dale, August 19, 1986
Montana	None	"There is no easing. Political subdivisions are tough."	Conversation with Insurance Commissioner Andrea Bennett, August 19, 1986
New Jersey	None (Legislature still in session)	"Availability is greatly enhanced except in liquor and environment."	Conversation with Insurance Commissioner Ken Merrin, August 13, 1986

Oregon	None (Legislature not in session)	"Four weeks ago we were getting 18 calls a day on our commercial hot line. Now we're down to 3 or 4. Most are on price, not availability. There's been a remarkable easing in the last several weeks, although liquor liability is still tough if they don't serve food. Pollution is a lot better. Prices have leveled off."	Conversation with Insurance Department Official Mary Alice DeJork, August 19, 1986
South Carolina	None	"A year ago there was trouble in all property/casualty lines, including property. Today availability for property and the shorter tail liability lines is greatly eased. For the very long tail lines, such as pollution, there is still some problem. Demand from insurers for increased market share has dramatically increased."	Conversation with Insurance Department Actuary Martin Simons, August 14, 1986
Tennessee	None	"A few markets are easing. For example, a few weeks ago, there was one market for day care, today there are 3 or 4. There are still pockets of problems, such as product and pollution."	Conversation with Insurance Department Rate Analyst Dick Weber, August 20, 1986
Virginia	None	"Mainline stuff is easing greatly, such as product liability. Prices are still going up but at sharply reduced rates. Lines still troubled are directors and officers, malpractice and environmental."	Conversation with Deputy Insurance Commissioner Paul Synott, August 14, 1986

Exhibit E

PART A History of absolute liability

INTRODUCTION

New Zealand's legal system was founded on English common law and, until the passing of the Statute of Westminster in 1931, many English statutes had application in New Zealand. The fundamental notion of legal liability based on fault, inherent in the English common law, has always been part of the New Zealand legal system.

In recent years, however, an increasing number of lawyers, academics, and others, have turned to the view that the fault system, which may well have served the needs of the nineteenth century and the early part of the twentieth century before the wide introduction of the motor-car, was inadequate to cope with the requirements of the later-twentieth century. Motor vehicle accidents which caused severe personal injury to the people involved led to a large number of cases being brought in the courts. Road transport legislation called for owners of motor vehicles to carry compulsory insurance so that claims brought by third parties were assured of being met once liability had been established. In addition, greater industrialization resulted in an increasing number of claims based on industrial accidents, so that actions founded on personal injury began to occupy an inordinate amount of the time of the courts.

Although the legal concept was founded on the rule that a wrongdoer was liable to compensate the person he injured, the statutory requirement of compulsory insurance in the road accident and industrial areas removed the burden from the wrongdoer and spread his liability among the community. Furthermore, only those injured people who could prove that their injuries were received due to the fault of another person could recover damages. In many cases their damages were reduced because of their own contributory negligence. In many cases they received nothing, but may have been incapacitated for life without compensation.

THE COMMITTEE ON ABSOLUTE LIABILITY

In 1962 the Minister of Justice appointed a Committee on Absolute Liability, chaired by the then Solicitor-General, Mr H. R. C. Wild, to examine and report on the desirability of the introduction of some form of absolute liability for deaths and bodily injuries arising out of the use of motor vehicles. The committee presented a majority report (with the chairman dissenting), which recommended "that it would be unwise to make fundamental changes in our present system until definite recommendations can be made that such changes will bring improvements". The committee did recognize, however, that there are good arguments for suggesting the abolition of the common law action for damages for industrial injuries, and for injuries received due to the use of motor vehicles, in favour of a more realistic and generous system of compensation.

THE WOODHOUSE ROYAL COMMISSION

Wide discussion in legal and other circles followed, and four years later, in 1966, the Government appointed a Royal Commission to inquire into aspects of compensation for personal injury suffered by people in employment. The Commission, chaired by Mr Justice Woodhouse, reported its findings in December, 1967. This document, now known widely as *The Woodhouse Report*, contained far-reaching recommendations which suggested a complete overhaul of the whole common law system and the introduction of a comprehensive system of compensation for people who suffered personal injury by accident whether in employment or not, and whether due to the fault of another person or not. The guiding principles recommended to be adopted for the system were:

> **First**, in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them, from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity.
>
> **Second**, all injured persons should receive compensation from any community-financed scheme on the same uniform method of assessment, regardless of the causes that gave rise to their injuries.
>
> **Third**, the scheme must be deliberately organized to urge forward the physical and vocational recovery of those citizens, while at the same time provide a real measure of money compensation for their losses.

Source: New Zealand Accident Compensation Commission, A brief description of the accident compensation scheme operating in New Zealand (1976).

> **Fourth**, real compensation demands for the whole period of incapacity, the provision of income-related benefits for lost income and recognition of the plain fact that any permanent bodily impairment is a loss in itself regardless of its effect on earning capacity.
>
> **Fifth**, the achievement of the system will be eroded to the extent that its benefits are delayed, are inconsistently assessed or are administered by methods that are economically wasteful.

THE WOODHOUSE REPORT—

Recommendations

The Royal Commission in making its recommendations recognized the inevitability of two fundamental principles:

> **First**, no satisfactory system of injury insurance can be organized except on a basis of community responsibility.
>
> **Second**, wisdom, logic and justice all require that every citizen who is injured must be included, and equal loss must be given equal treatment. There must be comprehensive entitlement.

The five guiding principles adopted by the Commission in its consideration of a system to replace the common law remedy can be summarized as:

(a) Community responsibility,
(b) Comprehensive entitlement,
(c) Complete rehabilitation,
(d) Real compensation,
(e) Administrative efficiency.

The Commission recommended in paragraph 489 of its report, a number of changes to the law that then existed. The changes recommended were:

1. Given a suitably generous scheme which adopts the five essential principles outlined in the report, it follows automatically that the previous ways of seeking to achieve the same or similar purpose become irrelevant.
2. Thus, the common law rights in respect of personal injuries should be abolished and the Workers' Compensation Act repealed.
3. Wherever relevant, existing benefits under social security would be merged with the compensation payable under the new scheme.
4. Such a scheme, involving the acceptance of community-wide responsibility in respect of every injured citizen must clearly be handled as a social service by an agency of the Goverment.
5. Procedures and techniques of private litigation should be replaced by non-contentious processes of assessment and reviewed with recourse to the courts only on a point of law.

Because of the wide-ranging effect, the Royal Commission's report naturally attracted considerable interest, not only in legal and insurance circles but throughout the whole community that was to be subjected to fundamental legal changes if the recommendations made in the report were to become law.

THE COMMENTARY ON THE WOODHOUSE REPORT

In April, 1969, the Minister of Labour announced a decision of Government that a paper would be prepared covering the form in which the scheme envisaged by the Royal Commission would operate if adopted, the variants or alternatives which might be preferred, and especially the question of cost. The paper was prepared, and was presented to the House of Representatives in October, 1969, under the title *Personal Injury — A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand.*

THE GAIR COMMITTEE

On October 23, 1969, the Government appointed a Select Committee to be chaired by the Hon. G. F. Gair, M.P., for the purpose of considering and reporting on The Woodhouse Report. A large number of people and organizations, including the medical and legal professions, the Automobile Association, employee organizations, employers, safety organizations and the insurance industry, made submissions and representations. The committee recommended partial implementation of the Royal Commission's proposals by two no-fault, funded schemes, one to cover earners (including the self-employed), the other to cover the victims of motor vehicle accidents

THE CABINET COMMITTEE

On the tabling of the Gair Committee Report in October, 1970, a Cabinet Committee was formed from the Ministers of Labour, Transport, Justice, and Social Welfare. The committee's function was to draw up draft legislation incorporating the recommendations of the Gair Select Committee. The Cabinet Committee then appointed an Officials Committee, comprising departmental officials from the Departments of Labour, Transport, Treasury, Justice, and Social Welfare. The function of the Officials Committee was to make recommendations to the Cabinet Committee on the form the legislation would take to implement the Gair Select Committee's recommendations.

In December, 1971, the Government introduced the Accident Compensation Bill in an incomplete form. The Bill, however, contained the framework of the legislation necessary to implement the recommendations of the Gair Report.

THE McLACHLAN COMMITTEE

A Select Committee of the House, initially chaired by the Hon. G. F. Gair, was formed and the incomplete Bill referred to it. The Government referred to the Select Committee additional provisions which were to be included in the Bill. Mr Gair was appointed a Cabinet Minister, and replaced as chairman of the committee by Mr C. C. A. McLachlan, M.P., and the committee then became known as the McLachlan Committee.

The McLachlan Committee sat over a period of some four months in 1972 and heard submissions on the form the legislation should take. It reported back to the House with a comprehensive Bill enacting the main recommendations of the Gair Select Committee Report. The McLachlan Committee reported the Bill back early in October, 1972; the Bill was passed through all stages in the House with little discussion and was enacted on October 20, 1972, as the Accident Compensation Act 1972. The Act provided cover for people who were injured in motor vehicle accidents (the Motor Vehicle Accident Scheme), or who were earners (the Earner's Scheme). There was provision in the Act permitting different parts of the Act to be brought into force by stages by separate Orders in Council operating from different dates.

The first Commencement Order was made on October 30, 1972, bringing Part I of the Act into force, establishing the Accident Compensation Commission as a body corporate to administer the two schemes.

LEGISLATION EXTENDING SCHEME TO NON-EARNERS

Following a change of Government in November, 1972, the Accident Compensation Commission was requested to prepare recommendations as to how the scheme could be extended to include non-earners. As a consequence, the Accident Compensation Amendment (No. 2) Bill 1973 was passed, introducing into the legislation the Supplementary Scheme so that the so-called *non-earners*, including housewives, would now be covered by the principal Act.

SUBSEQUENT AMENDMENTS

There was another amendment in 1973, which related to a machinery change, required to enable the Motor Vehicle Scheme to become operative.

The remaining parts of the Accident Compensation Act 1972, as amended in 1973 to include the Supplementary Scheme, came into force on April 1, 1974. From that date, section 5 of the Act effectively prevented any proceedings being brought in any court for damages arising directly or indirectly from personal injury or death by accident, suffered by any person in New Zealand thereafter. By this provision the common law right of action has now been laid to rest in New Zealand, except for suits arising before April 1, 1974, for damage to property, or otherwise not covered by the interpretation of the phrase *personal injury by accident*.

During the first few months of operation of the scheme, some minor anomalies and necessary improvments became apparent and a further amendment to the Act came into effect on November 8, 1974. This amendment made certain changes to enable the scheme to be more easily administered. It also introduced a limited definition of the expression *personal injury by accident*.

The 1975 amendment to the Act made changes in the methods of calculating compensation to ease administration and correct what were considered to be anomalies arising in the operation of the Act. It also provided the legislative provisions necessary for the dissolution of the Workers' Compensation Board.

The Accident Compensation Act is a revolutionary and unique piece of social legislation. Its introduction in New Zealand has attracted world-wide attention; it has effected a fundamental change in the very foundations of the common law of New Zealand. The architects of the scheme are justly proud of the way the scheme has been brought into operation, and that it has been accepted by the great majority of New Zealand citizens. Because of the novelty and the far-reaching effects of the scheme, and as experience is gained, it will probably be necessary to make further legislative amendments. There has been some criticism of the Accident Compensation Act on the grounds of length, and perhaps ideally an entirely fresh Act would be desirable. It is felt, however, that such a step should be taken only after the scheme has been operating for some time and when the chief problems have been identified and given attention.

Senator **Simon**. I thank you.

Mr. Riley, you said that we are going to be back again with another crisis, assuming that things are leveling off at this point. I think that is absolutely correct and I think we ought to somehow devise a system for moving in directions that I think most people would agree we ought to be moving in, and it is not going to be as far as you might like or I might like, but we can make some solid progress.

You heard me ask the question before on the agreed bill process. Let me ask all four of you: Do you think it makes sense to have a small committee representing the insurance industry, trial lawyers, business, consumers, a small group that meets and says can we come up with agreements? And if those representatives can come up with agreements on modification, I think they can be achieved.

But the reality is the four of you have been asked to testify on a bill that is not going anywhere. Now, my colleagues may not say that publicly, but that is the reality and they will tell you that privately. What do you think about having some kind of an agreed bill process here?

Mr. **Riley**. Well, if you mean by an agreed bill process, Senator, a negotiating process, I have always been one to believe in communication and through communication you usually get what is best for all parties concerned. The word "fairness" has been used here a number of times today, and I think that is the underlying theme that needs to be thought of by all of the interests in this issue.

I personally think that negotiation and communication is good, and nothing is etched in stone as far as the Independent Insurance Agents of America is concerned. We are always open to rethinking any process to determine if there is a better way. But the thing that we see, sir, is very discouraging to me as an individual insurance agent that is not normally involved in this political process, but just tries and does earn a living back home, is to come to Washington and hear people say nothing is going to pass.

This is a situation that I can tell you from personal experience, dealing with the average American citizen, the average consumer, the insurance buyer, it is a major problem. The American public, if it was put to a vote, would demand that Congress do something.

That comes back to what you just asked: How do we do something that is fair? You know, all this rhetoric has to be cut through, but something has to be done, because if it is not that boat and ship will sink again and with it go the insurance buying public, your constituents, my customers.

Senator **Simon**. I thank you, Mr. Riley.

Mr. Smith.

Mr. **Smith**. Senator, I think you are right on the money in terms of the parties to this game, if you will, getting together. You know, there has been enough name calling by everybody. There is plenty of fault to go around, quite frankly. I think the lawyers share in the fault, I think the consumer who wants to sue, you know, willy-nilly, at the drop of a hat, I think the insurance companies who throw caution to the wind because insurance rates are lowered to generate funds because they can invest them in high-interest dollars—we have a litigious society, if you will. That is a terrible situation in this country.

I think you are right about what needs to be done. I think the problem is we have been doing this or trying to do it for 5, 6, 10 years, and now the house is on fire and businesspeople around this country—when I sat at the White House Conference, you could walk through the halls of the meetings rooms of the hotels and you could hear little conversations. They were all talking about the same thing, and they all have horror stories, and I will just close with one.

I was sitting next to a lady who had been in the chemical business or the firm had been since the late 1800's, said to me, she said, "You know, I got involved in this issue this year, I am not a politician, I don't know anything about how Washington works. My company lost $100,000 last year, and the reason for that was our product liability insurance costs."

You know, you can say that about the banker, the doctor, the lawyer, the insurance chiefs. I think that, yes, your solution makes an awful lot of sense, but we need to do it now.

Senator SIMON. Mr. Angoff?

Mr. ANGOFF. Senator, I strongly support proceeding in that direction. I think that there is already agreement among a number of the parties in some surprising areas. For example, I know that our organization and Senator McConnell, and I think many of the insurance industries, will support—not Senator McConnell—many of the insurance industry groups would support not Senator McConnell's first bill that would limit recovery to severely injured people, but the second bill which is an ADR, alternative dispute resolution type of system. I think there is a lot of support for that.

Second, surprisingly for at least the substantial modification of the antitrust exemption, I think there is a substantial amount of support for even within the insurance industry. There is a new leader of the American Insurance Association who just took over a few months ago and he was quoted when he first took over as saying that we should look at McCarran-Ferguson—that is a very difficult position to defense. After that, he changed his remarks. Maybe Les knows something more about what happened then, but I know that there is quite a bit of support for McCarran-Ferguson modification again within the insurance industry as well as among consumer groups.

Then, finally, the question of data—and I think frankly that is the most difficult area for the industry to defend, because I found and others have found in testifying in various States that even legislators who are generally friends of the insurance industry—and I think Senator McConnell said this at an earlier hearing—do want to have the data and they do not have the data. Sure, they do have data which is submitted now in the annual report form, but they do not have data in English and they do not have the data that they need to decide what, if any, tort reform makes sense. I think on those three areas there could be some substantial agreement, and we would be very pleased to work toward it.

Senator SIMON. Yes?

Mr. CHEEK. Senator, I would support that, too. I think part of the problem, if you look back into history, has been that all of the players you need to have at the table do not show up. When one of the key players happens to be the trial lawyers who, as Mr. Habush said, simply do not participate in negotiations of this sort, it is kind of like having only two legs of a three-legged stool.

I think if the groundrule that he insisted upon, legislation that would not place limits on the recovery of injured persons, could be agreed upon initially, then perhaps they could come to the table, if I read him correctly.

On that score, I would like to say that I support the argument of those who have opposed caps. I think caps are bad from an insurer's standpoint in that they do not help the predictability of the smaller cases, because they tend to perpetuate the overcompensation of those cases. At the other end of the spectrum, they preserve the tort system's principal defect, which is the undercompensation of serious cases.

On the data issue, I think part of the insurance business' problem with the data reporting requirement is that historically all of the data that is collected has been done so only if it was useful for ratemaking purposes.

We are now talking about public policy issues that require a different cut at perhaps some of that same data. There are discussions, in which I am a participant, underway at the ISO to see if we cannot collectively come up with some of the kinds of data that you have indicated that you would like to have, to see if we cannot make a cut between economic versus noneconomic loss, and to, as Jay suggests, find out exactly how many people actually are subject to joint and several liability in particular cases.

I think we would welcome the opportunity to participate in the process, to let people know what minimal changes in the law we would need to be able to predict the risk. Then you, as public policymakers, would have to decide whether the costs involved in that predictable system were acceptable.

Senator SIMON. I thank you. And I thank all four of you for that answer. Nothing is going to happen realistically between now and November 4 on the political calendar. But it seems to me that if some of us were to get together and invite representatives of the various groups, just small groups to meet informally, and get Senator McConnell on that side and Paul Simon on this side, we can make progress. Some trial lawyers resist any change, though most acknowledge that there ought to be some change. Some insurance companies acknowledge they do not want any change.

I think there is a middle ground that has to be cultivated and that some of us are going to try and do that.

I thank all of you for your testimony.

Mr. ANGOFF. Thank you, Senator.

Mr. SMITH. Thank you, Senator.

Mr. RILEY. Thank you, sir.

Senator SIMON. The next panel, Mr. Gene Kimmelman, Linda Lipsen, Joseph Goffman, Ernie DuBester, and Prof. Marshall Shapo.

Prof. Marshall Shapo, of Northwestern University Law School, and we understand you have to catch a plane.

PANEL CONSISTING OF MARSHALL S. SHAPO, NORTHWESTERN UNIVERSITY LAW SCHOOL; GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA; LINDA LIPSEN, LEGISLATIVE COUNSEL, CONSUMER'S UNION; JOSEPH GOFFMAN, STAFF ATTORNEY, PUBLIC CITIZEN'S CONGRESS WATCH; AND ERNIE DuBESTER, ASSISTANT TO THE DIRECTOR, LEGISLATIVE DEPARTMENT, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Mr. Shapo. Yes.

Senator Simon. So if you duck out before we are through here, we understand.

Mr. Shapo. Yes, sir. I am grateful. I am Marshall S. Shapo. I am a professor at Northwestern University School of Law. My testimony represents my own views based on 20 years of teaching and the writing of several books, including three about product liability.

I must say I have come to believe from my appearances at various committees on this subject that perhaps there should be a Gramm-Rudman-Hollings bill to limit the number and scope of Federal statutes.

You have heard a lot about crises in insurance and data, and I suppose that an insurance layman may be forgiven for being puzzled when he sees headlines like "Reinsurers Predict Good Times Here to Stay," and "Insurers' Health Termed Excellent."

But the problem of getting accurate data is not limited to insurance. It extends to the question of how and why injuries occur, and it is for that reason that the very first recommendation of the Report of the ABA's Special Committee on the Tort Liability System, which I served as reporter, was for the creation of a permanent organization for the comprehensive collection of data on injuries.

A related point is that the general thrust of the proposals that I have seen appears to cut against requiring distributors of unreasonably dangerous products to compensate for the costs of harm caused by those goods, and if that happens the law has not served its deterrence role.

One of the biggest problems that I think would concern the Judiciary Committee is that a bill of this sort would pile an extra layer of decisionmaking and doctrinal complexity on the existing legal structure. I cannot imagine right now how the courts will deal with those problems.

I have said at other hearings that there may be a role for a few modest and highly specific Federal provisions aimed at some easily identifiable and especially irritating problems. But the difficulty has been, as you know, Senator, that there has been an expensively financed 6-year effort to build momentum for a much more comprehensive statute. I call it the baroque version of the law. And the enactment of that sort of statute will multiply—I think Senator Heflin is quite right about that—not simply add to our flock of legal problems. Litigation will probably increase and Congress undoubtedly will face demands for drastic amendment each session.

I should also say that I can think of nothing more calculated to undermine federalism than for Congress to tell the States that they have done such a bad job of making private law that the National Government ought to take it away from them.

I want to say a word about the phrase and the concept of tort reform. Surely there are ways to make the process of resolving tort cases more efficient. Indeed, it was a group of suggestions directed to process reform that comprised the principal recommendations, of which there are more than a dozen, of the ABA Special Committee's study.

But beyond that, I think that the kinds of substantive law reforms that these products bills would bring would create some terrible conceptual problems for courts that must deal with the rest of tort law day in and day out. In an era in which technology threatens to outrun our ability to deal with it, and regulation does not always keep up with technology, this kind of legislation would confuse and handcuff the courts. And the courts are an absolutely vital and relatively independent social watchdog agency.

Now, you have my prepared testimony, Mr. Chairman, so I would just like to close on a personal note. I returned last month from a fascinating trip to East Asia as the leader of a people-to-people delegation. We spoke with various officials in the Chinese Ministry of Justice and the state-run insurance company and we even witnessed a civil trial. It seemed to me, at least through translation, that while citizens of the People's Republic of China have a very ethical approach to questions that we think of as being issues of law, that that approach is highly collectivist.

The trial we witnessed was very much the exception in the Chinese system of justice, and it was striking to me as a student and often a critic of our own system of civil law how fortunate we are to have the legal process we do have. For all its faults, it preserves a substantial amount of freedom for the employment of counsel and the assertion of a cluster of rights that respond to the demands of our present technology.

Now, I certainly share the concerns that many members of Congress have articulated in favor of improving the legal process, but I am at least as concerned about the limitations that this bill places or may place on both our substantive rights and our ability to assert them.

I thank you very much, Mr. Chairman.

[The prepared statement of Mr. Shapo follows:]

MARSHALL S. SHAPO

Remarks on Proposed Federal Products Liability Legislation

Mr. Chairman, I am Marshall S. Shapo. I am the Vose Professor at Northwestern University School of Law. My testimony represents my own views, based on more than twenty years of teaching about tort law and related compensation systems. I have written nine books or long monographs about that area of the law, with three of them focusing on the law of products liability.

While my comments here are directed to the latest versions of committee drafts that I have had an opportunity to review, some of my comments relate to suggestions and proposals that reportedly will be offered as amendments on the floor.

A lot of people, mostly in the manufacturer and seller community, are unhappy about the law of products liability. The question is whether complex federal legislation is a solution that will improve on the present situation. I do not think it will.

A fundamental problem with the proposals in this area is that the data -- the economic statistics -- remain so controversial, and often even obscure. We have heard for many years, off and on, about a "crisis" in insurance and reinsurance, but recently we begin to get news articles like a recent one that is headlined, "Reinsurers predict good times here to stay." I also have in my file an item dated just this past August 19th with the subhead, "Insurers' Health Termed 'Excellent.'"

The problem of getting accurate data is not limited to insurance. It extends to the question of how and why injuries occur. It is for this reason that the very first recommendation in the Report of the ABA's Special Committee on the Tort Liability System, which I served as Reporter, was for "the creation of a permanent organization for the comprehensive collection of data on injuries and injury-causing events, and the ways in which individuals, communities, and the legal system repond to the problems created by injuries."

One reason why having that sort of data is very important is that products liability law, and tort law in general, are important social tools for controlling accidents -- achieving what is loosely referred to as "deterrence." The general thrust of the proposals I have seen appears to cut against requiring distributors of unreasonably dangerous products to compensate for the cost of the harm caused by those goods. If that happens, then the law has not served its deterrence role.

One of the biggest problems that would concern a committee of lawyers is that a bill of this sort would pile an extra layer of decisionmaking, and doctrinal complexity, upon the existing federal structure. On the basis of the bills I have reviewed, and as nearly as I can tell specifically with reference to S.2760, I have no idea how the state or federal courts are going to fashion rules of decision that will straighten out the extra layer of conflicts that will occur.

I have said at other hearings that there may be a role for a few modest and highly specific provisions aimed at some easily identifiable and especially irritating problems. I have suggested, for example, that a simple piece of legislation that creates a uniform statute of limitations and repose might be desirable.

The problem is that there has been an expensively financed six year effort to build momentum for a much more comprehensive statute -- an absolutely baroque law. The enactment of such a statute -- dragging Congress into the complexities of liability and defense doctrines and damages theories, not to mention frankly experimental efforts at alternative settlement procedures -- will multiply, not simply add, a flock of legal problems. Litigation will likely increase, and undoubtedly Congress will face demands for drastic amendment each session. Perhaps there should be a Gramm-Rudman-Hollings bill to limit the size and scope of federal statutes.

Mention should be made of at least one other problem of legal policy that legislation of this sort would create. Federalism has been an article of faith with Americans for all our history. It has been a particular dogma of the present administration. I can think of nothing more calculated to undermine federalism than for Congress to tell the state courts that they have done such a bad job of making common law that the national government must take it away from them. Not only is that a bad policy decision; it is based on an incorrect reading of history. I have studied these developments intensively since the late sixties, and I have the opinion that in its general outlines, if not in all specifics, the products liability law of the states is a powerful tool for justice. It happens that over the last quarter of a century, the state courts, partly in tandem with the state legislatures, have been working out the framework of a serious program of tort law for products -- and have been ironing out the kinks as they go along. The New Jersey experience with the Feldman case following the Beshada case is exemplary in that connection.

I understand fully that sellers and insurers feel that some aspects of this body of law are unfair. But I suggest that if Congress passes legislation of this sort, the perceptions of injustice that it will generate will dwarf the sense of injustice presently felt by sellers. When consumers come to understand what that sort of legislation has done to their rights, the result would be to make Congress sorry it has taken on this problem in the first place.

Finally, I want to say a word about the phrase, and the concept, of "tort reform." Senator Kasten once told me in a Commerce Committee hearing that I ought to read his mail. Well, I don't read Senatorial mail. But I think I do know something about what is called "tort" law. And I think I know that our current tort rules give a pretty good sense of how the lawyers we call judges, and jurors, think about the justice of individual cases in a broader social context. Undoubtedly, there are ways to make the process of resolving tort cases more efficient. Indeed, it was a group of suggestions directed to process reform that comprised the principal recommendations of the A.B.A. Special Committee's study. So a major point is that what principally needs "reform" is the process, and not the substantive rules of the law.

But beyond that, I think that the kinds of substantive law reforms that these products bills would foist upon us would create some terrible conceptual problems for courts that must deal with the rest of tort law day in and day out. In an era in which technology threatens to outrun our ability to deal with it -- and regulation does not always keep up with technology -- this kind of legislation would confuse and handcuff the courts. And the courts are an absolutely vital, and relatively independent, social watchdog agency dealing with the risks, and injuries, which often accompany progress.

Nobody doubts that progress has its price in accidents, in injured bodies and lives lost. But until I had more facts about how those injuries occur, how the law works, and how the insurance system operates, I would be very wary of replacing the law we have -- which is a lot more sensible than its critics allow -- with a complicated set of legal experiments.

Senator SIMON. Thank you.

Mr. Kimmelman, the legislative director for Consumer Federation of America. May I apologize to the panel: I am going to have to leave in a few minutes. Senator Broyhill will be here shortly. The staff will continue the hearings. I will stay for a few more minutes, but I will have to leave. I am not leaving out of irritation to any of the testimony.

STATEMENT OF GENE KIMMELMAN

Mr. KIMMELMAN. Thank you, Mr. Chairman.

On behalf of the Consumer Federation of America, I appreciate this opportunity to appear here this morning. We would like to indicate our opposition to S. 2760 and the amendments that Senator Kasten discussed this morning, because we feel that these proposals will tilt the balance of the product liability system against injured parties, making it more difficult for them to prove their case and leaving them undercompensated, especially for the most severe injuries, even when they can prove their case.

These proposals are one sided. We believe they would undermine the tort system's goals of providing fair compensation to those injured by dangerously defective products, and the system's goals of providing strong incentives to produce safe products.

This morning, I would like to focus, though, on some of the misuses of statistics that have plagued the entire debate over product liability legislation. Many observers have tried to draw conclusions about jury award trends by comparing the magnitude of dollars spent with the numbers of large verdicts over time, and there are a number of problems with this type of approach.

First of all, the value of the dollar has changed dramatically. A dollar today is not worth nearly as much as it was 10 or 20 years ago. Second, average earnings have changed. We would not want to compensate someone at a 1966 wage level for an injury that occurred in 1986. In addition, the costs of medical care have risen dramatically above the cost of inflation and that is a key component of all awards.

For serious injuries, it is very important to take into account the changes in life-long income. People are living longer today than they were ten or twenty years ago, and they need compensation to last longer, they need more money in retirement than they did 10 or 20 years ago.

Also the size of our population has increased by over 23 percent in the last 20 years, affecting the number of cases and the overall cost of our tort litigation system. Very importantly, something that has not been mentioned often, is that the size of our workforce has increased by over 52 percent in the last 20 years, putting more people into positions of risk of being injured since there are greater hazards in the workplace than at home.

Now, how should all these factors be analyzed and how do they affect jury verdicts over time? Well, we have done an analysis of this called "Trends in Liability Awards" that I would like to submit for the record here, and at this point I would just like to point out a number of the findings.

First of all, the impact of inflation over time has been startling. A particular dollar award in 1985, regardless of what level, has about half the value of the same dollar judgment in 1975, half the value, and only about a third of the value of that same judgment in 1965.

Now, just factoring in inflation, the often-cited 400 different million-dollar verdicts reported in 1984, that increased from only 1 million-dollar verdict in 1962, would have about the equivalent value of a $300,000 verdict in 1962, just taking inflation into account. So maybe we should be comparing small verdicts from the early sixties to these million-dollar verdicts today.

Obviously any legislation like S. 2760, which puts a cap on any part of recoveries, would be inflexible over time and would not reflect the important changes in economic and social conditions that have occurred in our society.

Even if one could ascertain a fair limit on pain and suffering, which we believe is impossible to do, what is the economic and social equivalent of that 10 years from now or 20 years from now? An example I think will illustrate this problem.

You take a 35-year-old worker who is rendered quadraplegic by a defective product and is disabled for life. Now, according to the Insurance Service Offices data, in 1975 a person like this on average would have received about a $500,000 award, $63,000 for medical expenses, $190,000 for lost wages, and about $253,000 for pain and suffering.

If one were trying to compensate a similar type person with similar injury today in exactly the same fashion, we would first have to look at what has happened with medical costs. Well, for hospitalization, costs are up 185 percent in this time period. We would then want to look at wages. Median wages are up over 90 percent for this period of time. And then looking at pain and suffering, we would find that the purchasing value of the dollar is only half of what it was in 1975. And look at life span, people are living 2 to 3 years longer in just this time period.

Based on the ISO's ratios of the factors of an award, in 1984 it would have taken $1,082,000 to compensate this person in precisely the same way that $505,000 compensated in 1975. Now, this award, which included in 1975 the S. 2760 maximum cap on a litigated pain and suffering claim, would include about double that amount for pain and suffering in 1984, just to compensate in exactly the same way. Obviously, the S. 2760 cap would provide less and less compensation for the same injury over time.

Clearly, the cap in this legislation would have a pernicious injust effect on individuals who out of no fault of their own are seriously injured by defective products. We therefore urge the committee to reject such onerous policy choices and avoid setting national policy on the basis of data that do not reflect basic changes in economic and social conditions over time.

Thank you.

Mr. HERMAN [presiding]. Thank you. There will be questions for the whole panel when we conclude the witnesses' testimony.

Ms. Linda Lipsen, legislative counsel with Consumers Union.

STATEMENT OF LINDA LIPSEN

Ms. **Lipsen**. I am Linda Lipsen, representing Consumers Union, the publisher of Consumer's Report magazine. I appreciate this opportunity to testify on this issue of great importance to American consumers. We have joined with the Consumer Federation of America, the U.S. Public Interest Research Group, Public Citizens Congress Watch in our written statement, which we submit for the record.

We cannot support any legislation such as the bill at issue today which would make it more difficult for the victims of unreasonably dangerous and defective products to be fairly compensated for their injuries. Most of the provisions of S. 2760, as our written statement provides for you in detail, would either undercompensate the injured or insulate the guilty.

Running as a common thread through S. 2760 is the false premise that economic losses are somehow more worthy of compensation, while other damages not as directly quantifiable are considerably less worthy.

The $250,000 cap on pain and suffering and the elimination of joint and several liability for so-called noneconomic losses illustrate the bill's favoritism for arithmetic and its blind spot when it comes to human suffering.

Let us not forget that pain and suffering is real loss. These are not fiction damages or a plot designed to fill the coffers of lawyers.

Consider for a moment the fairness of a $250,000 cap as applied in the case of a 4-year-old girl who suffered severe burns over the majority of her body from her highly flammable cotton pajamas. Her scars are permanent. Plastic surgery cannot improve her appearance. She faces six surgeries throughout her life and the risk of future ulcerations and other benign or malignant growths. These horrible disfiguring injuries will guarantee her little social solace and a lifetime of personal regret.

The $250,000 cap of this legislation clearly flies in the face of adequate compensation for this child. In severe cases under this legislation manufacturers will undoubtedly make an offer solely for the purpose of limiting the amount they will eventually pay to this child. The cap then would not function as an incentive upon plaintiffs to settle, since seriously injured plaintiffs already have overwhelming desires to resolve disputes and get on with their lives. Instead, this cap acts as an incentive for manufacturers to ditch their responsibilities for the large but justifiable damage awards.

A nonflexible formula for calculating compensable loss will do substantial injustice in individual cases. Where compensation is based chiefly on economic factors like wage loss and medical bills, et cetera, the victim's recovery would be drastically and unfairly reduced since many injured consumers are not wage earners and horrendous injuries may be untreatable.

The Dalkon Shield victim's inability to have children, for example, will not prevent her from actively pursuing her career. Similarly, clean amputation may not require much in the way of medical care and may not affect employment.

The general conceptual flaw in confining the measure of damages largely to economic losses is compounded for women. S. 2760 will result in undercompensation of both women who work in and outside the home. Because women continue to earn only 60 to 70 percent of what men make in comparable employment, an injured woman suffering the same product injury as a man might only receive 60 to 70 percent of what he would under this bill. Thus, the legislation will serve only to reimburse the wage differential between men and women present in the economy as a whole.

For women working in the home, the bill makes no attempt to calculate her real contribution to the running of the household in determining what is compensable loss. The bill instead limits the inquiry to allowing compensation only for replacement of household services or child care services which can be accounted for.

Under S. 2760, manufacturers guilty of the most egregious wrongdoing and those responsible for the most severe injuries will be able to make offers to limit their own liability exposure. Insulating manufacturers of unreasonably dangerous and defective products weakens the critical safety incentives of the tort system.

It is well documented that the tort system's function is to remove from the market such dangerous products as the Ford Pinto, birth control pills that cause stroke and cancer, and many, many other products. We have great fears that where manufacturers are able to limit their own liability, they will not pay as close attention to the safety consequences of their activities.

We favor product liability systems which promote safety and adequately compensate victims. This bill does neither.

Thank you.

Mr. **Herman**. Thank you.

Mr. Goffman, staff attorney with Public Citizen.

STATEMENT OF JOSEPH GOFFMAN

Mr. **Goffman**. Thank you very much. Public Citizen very much appreciates the opportunity you have given us to testify today on an issue of paramount importance to consumers. Our overriding concern in this debate is to insure that consumers injured by dangerously defective products secure adequate compensation for their losses in a quick and efficient manner. For this reason, we have been active and hopeful participants in Senator Danforth's efforts to fashion a compensation system that would meet these goals.

Sadly, despite its avowed goals, S. 2760 would defeat its own purposes since it would give manufacturers the right to act unilaterally to place an absolute cap upon their own liability. This cap is justified as critical to creating incentives for manufacturers to make settlement offers, but the system would only work if the cap represented substantially less than a jury would find the victim's suffering to be worth. The cap would work as an incentive only if it allowed a manufacturer to save a substantial amount of money.

In other words, the cap would create incentives for manufacturers to offer settlements only when the settlements represented substantial undercompensation of the victims. In the end, S. 2760's cap would be like any other. It would only lead to undercompensation of the most devastatingly injured victims, which the victims themselves will be powerless to resist, no matter how strong their cases were.

What is more, while the bill would all but blackmail victims into accepting manufacturers' settlement offers, it it would exert far less pressure on manufacturers to accept offers when victims initiated them. Unfortunately, in the vast majority of cases victims already have natural built-in incentives to settle, while manufacturers' incentives are ambiguous at best, consequently the key to fostering settlements is to create meaningful incentives for manufacturers to accept those offers that victims are inclined to initiate in the first place.

Because S. 2760 would not do this, it would simply not lead to settlements in the significant number of cases where settlements are appropriate.

Worse still for us is that this debate has hedged around with proposals to cap recoveries, repeal joint and several liability, and create new standards of liability, whose undisguised purpose is to deprive injured victims of adequate compensation and to discard vital incentives for the prevention of accidents and injuries in the first place.

To cap victims' noneconomic recoveries at $100,000, as some would do, means that the child who suffered irreversible brain damage or the young woman paralyzed from her neck down would be able to recover no more than this amount in compensation for their ruined lives. Anyone who would call it fair to repeal the doctrine of joint and several liability destroys the meaning of the word.

If a consumer is injured by one wrongdoer and the law calls upon that wrongdoer to compensate the consumer for all the losses that the consumer can prove. The presence of the second wrongdoer does not exculpate the first wrongdoer, nor does it make the victim less worthy of full compensation. Yet, without joint and several liability, that is just what would happen in some cases. An injured victim would be denied the current doctrine's assurance of full compensation for no reason other than that a party found guilty of wrongdoing could point to another party's coincident guilt, have its own liability reduced, and walk away leaving the victim with only partial compensation if the second wrongdoer turned out to be judgment proof or beyond the reach of the court.

To impose joint and several liability does not create unfairness to the wrongdoers. Under the doctrine of several and joint liability, any one wrongdoer is liable for all damages only when the harm is indivisible and only when the wrongdoer has been found to be just that, a wrongdoer.

Finally, the call for fault based standards of liability would make sense only if current law required no showing of a wrong for liability to attach. The doctrine of strict liability is a far cry from absolute liability. Under strict liability, injured consumers must prove that a product was defective, that the defect made the product unreasonably dangerous, and that the defective product caused their injuries. In short, they must prove that there was a serious wrong and the dangerous products themselves have been cast as surrogates for the dangerous or wrongful conduct that led to their design, manufacture, and marketing.

Courts have adopted this approach because it spares consumers the need to prove only what the manufacturer can know, the state of mind of the corporation.

Advocates of fault based standards invariably promote alterations in the law that would either force consumers to prove aspects of manufacture conduct that were nearly impossible to prove or would simply cut off the manufacturer's liability even when they had produced dangerously defective products.

In conclusion, all of these proposals would send a shocking message to both manufacturers and consumers. No matter how flagrant a manufacturer's malfeasance or catastrophic the effects of its wrong doing, the law will protect that manufacturer from the full financial consequences of its acts even at the expense of the victim.

Thank you very much.

[The joint prepared statement follows:]

STATEMENT OF

JOSEPH GOFFMAN
PUBLIC CITIZEN'S
CONGRESS WATCH

PAMELA GILBERT
U.S. PUBLIC INTEREST
RESEARCH GROUP

LINDA LIPSEN
CONSUMERS UNION

GENE KIMMELMAN
CONSUMER FEDERATION
OF AMERICA

ON

S.2760, THE PRODUCT LIABILITY REFORM ACT

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

SEPTEMBER 10, 1986

INTRODUCTION

Public Citizen's Congress Watch,[*] U.S. Public Interest Research Group,[**] Consumers Union,[***] and Consumer Federation of America[****] appreciate this opportunity to testify on S. 2760, the Product Liability Reform Act.

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[*] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its over 60 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

[**] U.S. Public Interest Research Group is a national, nonprofit, nonpartisan, research and advocacy organization. The group serves as the Washington, D.C. lobbying office for state PIRG's across the country.

[***] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Consumer Reports, with a circulation of approximately 3 million, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions.

[****] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

Ensuring that victims of dangerously defective products receive adequate compensation for their losses in a quick, certain and efficient manner is a goal of paramount importance for consumers. At the same time, we are confident that this goal can be met without undercutting the crucial role that the tort system plays in creating incentives for the marketing of safe products. For this reason, we are committed to those goals which S. 2760 purports to serve.

Unfortunately, S. 2760 would fail to ensure quick, adequate settlement of product claims. By granting defective product manufacturers an absolute, unilateral power to limit their own liability, S. 2760 would, contrary to the avowed intentions of its authors, ensure the undercompensation of the most catastrophically injured victims and partial immunization for the makers of the most devastatingly dangerous products. Consequently, we must oppose S. 2760.

The bill, moreover would make substantive alterations in State tort law that would only jeopardize victims' ability to obtain full recoveries for their injuries and hamper the civil justice system's capacity to create incentives for product safety. S. 2760 would: 1) truncate the doctrine of joint and several liability, reducing victims' ability to recover fully for their injuries while multiplying the complexity of litigaton in multi-party cases; 2) make it more difficult for plaintiffs to establish manufacturers' liability for punitive damages; 3) limit plaintiffs' ability to hold product sellers responsible for marketing unreasonably dangerous products; and 4) make it impossible for the victims of faulty equipment more than 25 years old to recover anything at all for their injuries. Such provisions clash violently with the legislation's purported goal of speeding adequate compensation to injured victims. At the same time, the bill would fail to address some of the basic elements of inefficiency in the current system, elements that lead ultimately to undercompensation of victims. For example, the bill's record retention requirements are weak, and the bill is silent on the problem of the excessive transaction costs stemming from the abuse of protective orders during discovery.

S. 2760 is a grievously unbalanced bill, a far cry from the avowed intentions of the Commerce Committee. While it would confer a hefty discount in potential liability for those who made and sold dangerously defective products, it would do virtually nothing to improve the lot of the victims of those products and little to protect consumers in general.

1. The bill's cap creates incentives by creating injustice

By far the single most egregious element of S. 2760 is the grossly unfair and arbitrary $250,000 cap on so-called non-economic losses that manufacturers would be able to clamp on the recoveries, at trial, of injured victims. This cap would come into play only for those who had been victimized by the most devastating injuries and would remain in place even after the victim had succeeded in proving every element of his or her case, ranging from the manufacturer's wrongdoing to the full extent of the victim's losses.

Characterizing the cap as an "incentive" to settle, as the bill's proponents do, camouflages a cruel manipulation of the scales of justice. What is gained through this "incentive" — a cheap buyout and exoneration for the most egregious manufacturing practices — is more than outweighed by the gross injustice worked by limitations on recovery for severely injured victims.

Under Title II of the bill, whenever a manufacturer offered a victim payment for out-of-pocket expenses plus $100,000 for the pain and suffering caused by the victim's permanent disability or impairment, the victim's right to recover for his or her so-called non-economic losses would be absolutely limited to $250,000 at any trial following rejection of the offer. In those cases where the victim had been lucky enough to escape with losses of less than $250,000, this cap would add nothing to a manufacturer's incentives to settle since the manufacturer's risk of loss would not exceed the cap. Where the cap would foster such incentives would be those cases in which $250,000 represented a good deal less than the victim's actual non-economic losses. The measure of the cap's effectiveness in inducing settlement offers could be calculated by simple arithmetic: the more money above the cap a jury is likely to award, the greater the manufacturer's incentive to settle. Thus, the cap would work as a settlement-incentive only because it would give manufacturers a clear-cut opportunity to undercompensate the most grievously injured victims. Since combatting undercompensation is supposedly one of the bill's chief objectives, the cap would in fact be self-defeating.

By facilitating such undercompensation, not only would the cap work an injustice to the victim, but it would decimate the safety incentives created by the tort system. Manufacturers whose dangerously defective products had caused the most devastating injuries would be able to use the cap as a partial shield against the full costs created by their unsafe products. This is just the opposite of what tort law should do.

Lying at the crux of the cap's unfairness is the victim's total inability to resist or escape undercompensation. Though a victim could reject the manufacturer's offer and go to trial, such a course would represent a virtually empty exercise. Even after proving gross negligence by the manufacturer and demonstrating his or her own extensive and catastrophic loss, the victim would nevertheless face the $250,000 limit, no matter how great the jury award was. Simply by making the initial offer, a manufacturer could preclude the victim from gaining complete recovery at trial no matter how strong the victim's case.

Because of the futility of litigation even for those with the strongest cases, Title II would create an even greater margin of undercompensation when put into practice --again, defeating the express purpose of the bill's authors. The $100,000 settlement figure, not the $250,000 post-trial limit, would be the real cap on victims' compensation. Knowing that the inevitably protracted and grueling litigation that followed rejection of a manufacturer's settlement offer would bring no more than an additional $150,000 beyond the settlement offer, even those with the most severe injuries and the strongest cases would feel compelled to accept the initial offer. Thus, the

$250,000 cap on litigation awards would simply serve as a background element bolstering the real recovery limit of $100,000 on so-called non-economic losses.

In short, if the cap is an incentive for the manufacturer then it is an outright penalty for the catastrophically injured victim. In fact, the victim's penalty would mirror the manufacturer's incentive: the stronger the victim's case and the more extensive his or her pain and suffering the greater that penalty would be. Because the cap would all but force the victim to accept the initial offer, then Title II would essentially take away the victim's ability to use the strength of his or her case. Since offers would be made almost exclusively in cases where the victim's pain and suffering clearly exceeded $100,000, the victim would be penalized by simple undercompensation; the greater the victim's suffering, the greater the undercompensation and the greater the penalty.

2. As a settlement incentive the Title II cap is utterly superfluous.

The ultimate illogic of using the cap as a settlement incentive lies in the fact that those whom the cap would most penalize—the catastrophically injured—in fact have inherent clear-cut incentives to settle. A cap would do little to augment their incentives, because victims of devastating injuries face overwhelming needs. They must pay large medical bills and meet extensive rehabilitation and change-of-lifestyle costs. Their interest is in getting over, rather than prolonging, the psychological trauma of being injured. The mere presence of an adequate offer of settlement would be enough to activate these powerful incentives to settle. The Insurance Services Office finding that 96.5 percent of product liability claims are resolved out of court surely reflects the power of these incentives. See Insurance Services, Office Product Liability Closed Claim Survey (1977) ("ISO"), p.95.

At the same time, the abundance of these incentives only highlights, again, the injustice of the cap. Only those with both the surest, strongest cases and the most overwhelming pain and suffering losses would defy the enormous pressure to settle their claims quickly and take on, instead, the stress, uncertainty and delay of full-blown litigation. It is on these victims that the cap would have its most drastic penalizing effect, an effect that can be justified by no rational policy.

The cases in which the cap would be significant represent only a tiny fraction of product claims. According to the Insurance Services Office, 91 percent of those claims that end in some form of payment to the victim involve no permanent disability (only those consumers with permanent disability would be subject to the $250,000 cap). See ISO, p.113. In cases that did not involve the most devastating and expensive injuries, the cap would have no effect whatsoever on parties' settlement incentives, since those losses would not exceed the cap. These latter cases represent the vast majority of product claims, but the cap would contribute nothing to promoting their rapid settlement.

3. Compensation for pain and suffering is vital for victims

The difficulty in quantifying pain and suffering or non-economic losses must not obscure the fact that pain and suffering represents tangible, compensable loss. There is simply no reason to deny injured victims who prevail in product liability suits full recovery for these losses. Injuries that cause brain damage, quadraplegia or blindness, for example, bring ruin to the lives of their victims in ways that cannot be compensated simply by calculating wage replacement, medical expenses and payment of other categories of strictly "economic" damages. We believe that Congress should not get involved in the elements of litigation that, almost by definition, vary from case to case. Only the parties or a judge or jury fully acquainted with the facts can decide whether $100,000 in settlement or no more than $250,000 in litigation would be just compensation for the ruinous effects of: loss of legs, arms or eyesight, loss of the ability to bear children, loss of movement or mental capacity or the agony of severe burns. We are hard pressed to imagine what legislative findings or rationale could justify the $100,000/$250,000 pain and suffering limit in the following cases:

* A 13-month-old child suffered severe internal burn injuries after ingesting a common household drain cleaner from a container that the manufacturer had failed to make child-proof. The child was hospitalized for nearly a year and required surgery to reconstruct his esophagus. He continues to require periodic hospitalization and suffers from permanent malnutrition and

bodily scarring caused by internal lye burns. Carr v. Clorox Corp., Mich., Wayne County Circuit Court, No. 79-918-357, Oct. 4, 1982.

* A 48-year-old homemaker was totally blinded by an exploding container of drain cleaner whose screw-on top permitted water to enter and make contact with the contents. The ensuing reaction generated such intense heat that the can exploded. Moore v. Jewel Tea Co., 253 N.E. 2d 103 (Ill. App. 1969); aff'd 263 N.E. 2d 148 (Ill. 1970).

* A 4-year-old-girl suffered severe burns over her arms, chest, stomach, back, neck and chin after her cotton pajamas were ignited instantly by an electric stove when she leaned over it to turn off a timer. Her scars are permanent; plastic surgery cannot improve her appearance. She faces at least six surgeries throughout her life, and the risk of future ulcerations and other benign or malignant growths. Gryc v. Dayton Hudson Corp., 297 N.W. 2d 727, (Minn. 1978); cert. denied, 449 U.S. 921 (1980).

* A farmer was seriously burned by gasoline that, because of a faulty tank-cap, "geysered" from the fuel tank of the tractor he was riding. Stambaugh v. International Harvester Co., Illinois Appellate Court, Fifth District. No. 80-175, April 14, 1982.

Consider, also, these cases. While they may not involve wrongdoing by a product manufacturer, every single injury could have been caused by a defective product. Equally important, the victims in these cases did not, and will not, have their rights to full recovery curtailed by federal product liability legislation. In contrast, victims with identical injuries would have their recovery rights impaired by S.2760 simply because their injuries were caused by products.

* A 19-year-old woman was left a spastic quadraplegic with serious speech defects after the car she was driving collided with a train.

* A five-hour-old infant was burned over 40% of her body when a high-intensity heating pad was applied directly to her skin. She had five operations in the first six weeks of her life and will require periodic surgery and hospitalization for the rest of her life.

* A 19-year-old woman was pinned under an engine and severly burned in a plane crash. Suffering burns over 70% of her body she begged her rescuers to kill her; her face had to be re-built surgically and all of her fingers had to be amputated. After 25 years she still suffers from pain and insufficient strength to work.

4. The fixed $100,000/$250,000 limitations ignore economic reality

Even if there were legitimate reasons for restricting product liability recoveries, which we do not believe there are, it is essential that any recovery limit be defined to account for changing economic conditions over time. If a particular limit on recovery at one point in time is considered equitable, it must be adjusted automatically to reflect basic changes in economic and social conditions over time — ranging from average wage changes to altered productivity and longevity.

Take the case of a 35-year old who suffered quadraplegia in

1975 as the result of injuries caused by a defective product. According to the Insurance Services Organization, the average 35-year old quadraplegic victim would have received a $505,000 (trended) award in 1975. ISO, p.116. The award probably would have included about $63,000 for medical expenses, $190,000 for lost earnings and other economic loss, and approximately $253,000 for pain and suffering -- approximately the S. 2760 cap on pain and suffering.

Now, assume the very same injury occured to the same type of person in 1984. To treat this victim like the 1975 victim, the 1984 victim should receive an award of $1,082,000, given the Insurance Services Office estimate that pain and suffereing equals approximately economic loss for this type of award, (ISO, p.46) a 90 percent growth in median household income between 1975 and 1984 (from $11,000 to $22,400) (U.S. Department of Commerce, Bureau of Census, Statistical Abstract of U.S., (1986), Table 742) and a 185 percent increase in hospitalization and other intensive treatment costs during this same period. (Id., Table 797) This increase does not include increased life expectancy (5 percent) (I.d., Table 16) or any social change that occured during this nine year period. Clearly, a $250,000 cap on pain and suffering in 1975 that may have been considered reasonable in the context of a half-million dollar settlement or verdict, would fall far short of meeting the equivalent economic and social needs of victims today. To maintain equity over time, a capped system of recovery must automatically take economic and social changes into account. S. 2760 fails to address this issue.

5. S.2760 offers little hope to victims who seek to settle cases with reluctant manufacturers

While Title II would grant manufacturers the opportunity virtually to blackmail the most grievously injured consumers into accepting undercompensation rather than pursuing their rights at trial, it would give those victims who would welcome quick settlement of their claims few tools with which to overcome the resistance of recalcitrant manufacturers. The bill's gross imbalance ignores completely the natural, built-in incentives of both victims and manufacturers.

As we explained above, the pressing needs caused by serious injuries compel virtually every victim to seek rapid payment of his or her claim. That is why its punitive effect in the name of "incentives" makes the cap so anomalous.

By contrast, when faced with options of either settling a case or resisting, a manufacturer's natural incentives are ambiguous at best. If S.2760 were truly designed to foster settlements, it would ensure that when victims, responding to their own strong incentives, initiated settlements, manufacturers' settlement incentives would be clear and unambiguous. Indeed, since victims already have strong incentives to settle, this is the key to any settlement-inducing scheme.

Unfortunately, Title II would bring only feeble pressure to bear against manufacturers' instinctive resistance to the payment of substantial claims. A manufacturer who rejected a victim's settlement offer would have to pay the victim's attorney's fees if, at the subsequent trial, the jury returned a verdict greater than the victim's initial offer. The manufacturer's penalty would, however, be no greater than $100,000 and that figure could be reduced if the case involved complex factual issues. When weighed against the many incentives manufacturers have to resist claims, even a $100,000 penalty appears simply too weak to guarantee settlements, particulary where claims are substantial. What is more, any threat posed by the $100,000 penalty would be seriously undermined by a manufacturer's reasonable expectation that it could persuade the court to reduce the penalty simply by pointing to the factual complexity of the case.

Ironically, the Commerce Committee Report itself makes a convincing case for manufacturers' strong incentives to resist claims, particularly substantial claims. The Report cites several studies showing that victims of serious and expensive injuries suffered lengthy delays before their claims were paid. The Report also cites a study demonstrating that those with the largest losses were substantially undercompensated. See Report of the Committee on Commerce, Science and Transportation on the Product Liability Reform Act (S. 2760), Rep. No. 99-422 at pp. 3-5. Such delay and undercompensation can only be traced to the obvious incentives manufacturers have to resist paying claims, especially when they are substantial. While S.2760 goes to one extreme in responding to these incentives by granting manufacturers who offer settlements a cap, it drastically underestimates these very same incentives in creating so ambiguous a penalty for those manufacturers who resist victims' settlement offers. The bill's $100,000 penalty, which could be easily avoided in complex litigation would hardly offset these incentives.

The most obvious reasons a manufacturer has for resisting paying a claim is that substantial delay in making payment can itself be profitable. Delayed settlements can be much cheaper for manufacturers thanks to the corrosive effects of delay on a victim's will and wherewithal to pursue his or her claim. The findings of the Commerce Committee Report suggest not only that manufacturers adhere to such a strategy but that it is quite a successful strategy as well. There is little reason to think that under S. 2760, a manufacturer would not maintain this same strategy by rejecting a substantial Title II claim and then embarking on lengthy litigation in the hope of coercing a later, cheaper pre-trial settlement.

In addition, manufacturers have strong "business" considerations that run counter to incentives for early settlement. Any claim involving one product unit directly or indirectly implicates every unit sold or to be sold in the product line. This is obvious in cases involving mass market consumer products and applies in the case of most other types of products as well. Thus, a manufacturer may feel compelled to defend its product in order to save the marketability of the entire product line. A manufacturer may, for example, wish to maintain its share of a market by keeping a possibly defective product in that market until a superior successor product can be perfected and released for sale. In that case, the manufacturer may opt to continue to defend its current product, extending litigation and resisting settlement until the successor product is ready. Such a manufacturer, like manufacturers in many other circumstances, may adopt a policy of resisting settlements in the belief that such resistance is the only way to head off a feared glut of claims against its products.

Incentives such as these could easily outweigh the risk of having to pay the Title II penalty. Since most product liability cases involve complex questions of fact, manufacturers would have good reason to expect that the penalty would be reduced under section 203(b) in virtually every case. In addition, manufacturers pursuing a later-settlement strategy could expect to dispose of the penalty as part of the settlement.

Finally, comparing the Title II penalty with the de facto penalties and risks which attend extended litigation under the current system shows just how little the penalty would add to manufacturers' incentives to settle substantial claims. A manufacturer facing a product liability claim today can probably expect that if it loses the case following a jury trial it will suffer a judgment many times greater in size than any settlement amount it would pay early in the litigation. At the same time, for the privilege of trying and losing the case a manufacturer will also have to pay considerable fees to its defense attorneys and experts and bear the costs of diverted employee time and energy inevitably entailed in the discovery and preparation process. Nevertheless, as the Committee Report so strongly suggests, resistance and delay are key elements of a typical manufacturer's response to a substantial product liability claim. It is, therefore, hard to be confident that the Title II penalty would work any more effectively than these already existing incentives for settlement in overcoming manufacturers' propensity to resist substantial claims.

6. Title II's settlement formula is inequitable by definition

Sections 201 and 102(a)(6) would provide that a settlement offer for any "dignitary loss" be $100,000. By thus equating the dollar value of each kind of "dignitary loss", the bill would create gross inequities in settlement. For example, the dignitary loss suffered by a brain-damaged quadraplegic would, according to the authors of S.2760, justify no greater compensation than that available for the dignitary loss caused by a right-hander's loss of the use of his or her left arm. Such an outcome fails even the most primitive definition of equity.

At the same time, contrary to the bill's purported goals, virtually every settlement offer would represent either over- or undercompensation for the individual victim involved. Consequently, both parties' incentives to make or accept settlement offers would be seriously distorted. While the difficulty of quantifying dignitary losses should not be permitted to create complexity or delay in a compensation system, the bill's blind assignment of a flat monetary value for all cases is needlessly clumsy. Surely, the use of a simple, last-best-offer arbitration system for resolving disputes about the value of dignitary loss on a case-by-case basis would be far more just and efficient and conducive to creating incentives to settle.

7. The bill's partial repeal of the doctrine of joint and several liability would doom some victims to undercompensation

By repealing the doctrine of joint and several liability as applied to non-economic damages, section 308 would guarantee that in a significant number of cases, victims, particularly those with the most devastating injuries, would be undercompensated, even after successfully proving their cases. Section 308 represents a blatantly inhumane policy choice: instead of placing any shortfall in a party's ability to contribute to the victim's compensation on the shoulders of the other parties who had been responsible for the victim's injury, the law would now place that burden on the injured victim him- or herself. That such a shortfal would involve compensation for non-economic harm does not make the policy any less harsh. As we have explained above, pain and suffering losses can be as devastating as those which are strictly measurable by "economics."

The cruelty of this outcome is compounded by its unfairness. Under current law the doctrine of joint and several liablilty applies only where the harm suffered by the victim is "indivisible". In addition, before any one party can be held jointly and severally liable for all of the victim's harm when that harm was caused by other parties as well, that party must be found guilty of conduct that by itself could have caused the harm or that was an essential or substantial factor in causing the harm. In these circumstances, the doctrine calls for the reponsible party to bear the cost of the harm, not the victim. The fact that other parties may also have engaged in wrongful conduct does not have any exculpatory effect with regard to the defendant, given that the defendant was guilty of wrongful conduct. Similarly, the fact that more than one party caused a vicitm's harm does not render the victim less deserving of full compensation than he or she would be if only one party were responsible.

Section 308, however, would repudiate this principle. The provision would, in effect, deem certain victims less worthy of full compensation just because they happened to be injured by more than one party and one or more of the guilty defendants proved to be insolvent. In fact, under section 308, an injured victim would be denied the current doctrine's assurance of full compensation for no reason other than that a party found guilty of causing the victim's harm could point to another's coincident guilt and the latter defendant proved to be insolvent. In that case, the injured victim, through no fault of his or her own, would be denied full compensation, eventhough the victim had proved the guilt of a solvent party. What is more, this outcome would be the same even in cases where each of the wrongdoers had engaged in concerted action with the others, a circumstance which gave rise to the most ancient elements of the doctrine. As a result, a wrongdoer could evade full liability and leave the victim undercompensated eventhough the wrongdoer had acted with the other responsible parties according to a common design.

Since section 308 would call upon the trier-of-fact to apportion responsibility in cases involving indivisible harm, product liability actions with multiple defendants would assume absurd levels of complexity. Even the bill's supporters have acknowledged that the doctrine of joint and several liability originated in those cases where courts were simply incapable of apportioning responsibility. See Report, pp. 68-69. Nevertheless, the bill would blithely impose on courts the duty of doing the impossible: apportioning responsibility in all cases. For example, an insulation worker suffering from asbestosis who had used the asbestos products of several different manufacturers would essentially be forced to demonstrate which asbestos fibers made by which manufacturer had damaged which section of his lungs.

Thanks to section 308, victims concerned about being undercompensated would have a strong incentive to sue as many different parties as possible in the hope of offsetting the insolvency of any of the parties in the suit, while defendants would have a strong incentive to implead other parties as well. At the same time, victims would be compelled not only to try their own cases but to "defend" those parties who were insolvent or with whom they had reached pre-trial settlement. This multiplicity of defendants as well as the inherent complexities introduced by section 308 would confute rather than clarify all parties' incentives to settle. Thus, section 308 would militate against the avowed goals of S.2760 by multiplying the burdens of litigation and distorting settlement incentives, in addition to making undercompensation of some victims an inescapable element of the tort system.

8. The bill would unjustifiably protect certain manufacturers from punitive damages

S.2760 would partially undermine the role of the tort system in creating incentives for safer products by inappropriately narrowing the availability of punitive damages.

Section 303(a) would limit punitive damages awards to cases where the harm suffered was the result of conduct demonstarating a manufacturer's or product seller's "conscious flagrant indifferencce to the safety of those persons who might be harmed by a product" (emphasis added).

This formulation of the standard of proscribed conduct is far too narrow and would eliminate cases where punitives are appropriate. Most courts have rejected the "flagrant" standard and favor broader, more traditional liability standards, such as "willful," wanton," malicious," "conscious or reckless disregard of the rights of others." See Skogen v. Dow Chemical Company, 375 F.2d 692, 704 (2nd Cir. 1967) At the very least, Section 303 should allow punitives for reckless behavior since punitive damages should be employed to punish and deter reckless conduct as well as conscious indifference to safety concerns. Thus, the manufacturer's or product seller's reckless or conscious indifference to safety in general as well as to the rights of others is essential to describing the type of behavior punitives are designed to reach. Section 303's standard is also unduly confusing. The language suggests that the defendant could escape a punitive damage assessment if it were to show that the plaintiff (though injured) "was not a person who might be harmed by the product."

In addition, section 303 confers unjustified protection to manufacturers of drugs, medical devices and aircraft simply because they had obtained pre-market governmental approval. While pre-market approval of such products is clearly relevant to the issue of a manufacturer's liability for punitive damages, there is no reason for pre-market approval to be dispositive on the issue. To make it so would be to misconstrue the roles of the Federal Aviation Administration and the Food and Drug Administration and to impair the ability of the tort system to complement these regulatory authorities.

The purpose of punitive damages is not only to impose after-the-fact punishment but to deter wrongdoing. Removing the threat of punitive damages would strip away an element of consumer protection that may be as vital as any provided by the regulatory agencies involved since neither the FDA nor the FAA can guarantee against all forms of manufacturer wrongdoing.

For example, manufacturers can discover product dangers after a drug or device is marketed and resist modification or recall without being guilty of "withhold[ing] or misrepresent[ing]" information, which are the only actions for which manufacturers would lose their section 303 immunity. Although the manufacturer of the Bjork-Shiley heart valve knew that over 100 patients suffered a fracture of the device's strut and that there were many resulting fatalities, recall was resisted despite Public Citizen's persistent petitioning of the

FDA. Similarly, the drug industry fought the FDA staff's desire to require labeling on aspirin that warned of the possibility of death when aspirin was used to treat children for flu or chicken pox. Despite evidence of several hundred such deaths each year, the industry succeeded in persuading the Office of Management and Budget to overrule the agency. Finally, after four years and several lawsuits, the labeling requirement was adopted.

A close look at the way the FAA functions shows the critical importance of the civil justice system, including its capacity to impose penalties through punitive damages, in helping to assure product safety.

While it is correct to assert that the FAA establishes standards for aircraft design, materials, workmanship, construction and performance, the Federal Aviation Act of 1958, 49 U.S.C. 1421 (a)(1)(Supp. 1985), specifically requires the agency to set only minimum safety standards. Compliance with these standards indicates no more than that the manufacturer performed the minimum effort required to make a product safe. See Restatement (Second) of Torts, §288C (1969) See, also, Wilson v. Piper Aircraft Corp, 77 Ill. 2d 434, 396 N.E. 2d 534 (1979). In addition, government standards may be outdated or underprotective, and may not reflect the state of knowledge of the industry concerning all safety consequences of industry practices.

More important, FAA regulation often amounts to nothing more than self-regulation by the industry. In certifying the design, manufacture and airworthiness of a craft, "by regulation, the FAA has made the applicant itself responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements." U.S. v. S.A. Empressa De Viacao Aerea Rio Grandense Varig, 467 U.S. 797, 104 Ct. 2761, 276-56 (1984); see also 14 CFR †21.33, 21.35 (1983).

In view of this, it is not surprising that the Supreme Court of California concluded in Elsworth v. Beech Aircraft Corp., 208 Cal. Rptr. 874 (1984):

> As we have seen, the certification program is largely administered by the manufacturer, which develops the plans and performs the tests to assure that the design complies with safety regulations.
>
> *
>
> Here, there can be no question as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes, in spite of the fact that federal law may have completely occupied the field of regulation of aircraft safety and certification. The Federal Aviation Act of 1958 expressly declares that its provisions are not intended to abridge remedies that a party may have under state law. (49 U.S. C. §1506).

We are not aware of any alteration of the Federal Aviation Act or of any changes in FAA practices that would justify the abridgment of state tort law remedies embodied in section 303.

In sum, the regulatory roles of the FDA and FAA simply cannot succeed by themselves in guarding against manufacturer wrongdoing. The civil justice system provides indispensable assistance in protecting consumers. Since the deterrent effect of punitive damages is a critical element of the civil justice system, punitive damages must be preserved for manufacturers of drugs and aircraft.

9. There is no justification for curtailing the liability of product sellers

The law in most states holds product sellers, such as wholesalers, retailers and distributors, to the same strict liability standards as manufacturers. Courts have cited a number of strong public policy reasons for treating product sellers and manufacturers alike in product liability cases.

First, product sellers can, and often do, inspect and test their products for quality and safety. Therefore, it is fair to hold sellers responsible for injuries that these products cause. Second, by holding product sellers to a high standard of care, the law encourages quality control practices, which lead to safer products. Third, product sellers can exert substantial pressure on manufacturers to produce safe products by refusing to carry unsafe and untested goods. Sellers will be most inclined to apply this pressure if they are held responsible with manufacturers for dangerously defective products.

Section 302 would establish a negligence standard for product sellers in cases involving construction and design defects and inadequate warnings. However, the provisions in this section may be more restrictive than traditional negligence standards.

Under section 302(b)(2), product sellers would be liabile for failing to warn only if they failed "to provide any ... written warnings or instructions received while the product was in the product seller's possession and control; or to make reasonable efforts to provide... warnings and instructions which it received after the product left is possession and control." The use of the word "received" implies that the product seller is responsible only for passing along warnings that have been provided by another party, such as the manufacturer. It is important that the product seller also be required to warn of dangers that the seller has independently discovered.

Section 302(b)(3) would provide a complete defense to product sellers who show there was "no reasonable opportunity to inspect" the product that caused the consumer's injury. However, section 302 already would require a plaintiff to prove that the product seller failed to exercise reasonable care with respect to the product. While the fact that the seller had no reasonable opportunity to inspect the product is evidence of the seller's due care, it should not preclude consideration of other factors important to the determination of negligence.

10. The bill's statute of repose would arbitrarily cut off victims' rights to compensation

Under section 304, consumers and workers injured by 25 year-old capital goods would be all but barred from bringing suit and thus effectively barred from seeking compensation under Title II. As a result, S. 2760 would automatically cut off remedies even before the injury or death occurred or before these claims reasonably could be asserted. This automatic cut-off would operate to prevent recoveries, irrespective of the useful life of the product, which varies greatly from one product to the next.

It is illogical to bar just, provable claims, without any regard to the underlying cause of the injury solely because of the age of the product. Moreover, we fear that such an arbitrary prohibition would inevitably lead to fewer safety precautions in the design and manufacture of products having a useful life beyond 25 years.

These unduly harsh provisions are unnecessary. Most successful product liability lawsuits do not involve old products. One comprehensive study revealed that only 2.7% of the products involved in product liability actions were purchased more than 6 years prior to the injury-causing event. A survey of Utah's manufacturers similarly showed that only one of its 500 members had a claim filed against it for injuries resulting from products more than 6 years after the original purchase.

11. Strict Liability and "Fault-Based" Standards

Many proponants of federal product liability legislation, driven by a desire to keep the profits resulting from the sale of defective products in the pockets of producers and distributors and out of the pockets of injured consumers, seek only to do away with the current product liability doctrine of strict liability and replace it with so-called "fault-based standards." Strict liability is, however, critical to ensuring that the victims of dangerously defective products are compensated for their injuries and to maintaining incentives for product safety.

Strict liability is not shorthand for the *carte blanche* payment of meritless claims; it is not absolute liability. Rather, strict liablility creates rigorous, but fair, proof requirements. Injured consumers must prove by a preponderance of the evidence that the product was defective, that the defect rendered the product unreasonably dangerous and that the defective product caused their injuries. In short, they must prove that there was a serious wrong.

If anything, then, strict liability is shorthand for negligence and wrongful conduct. The doctrine casts the dangerous products themselves as surrogates for the dangerous or wrongful conduct that led to their design, manufacture, and marketing.

This becomes crucial because it spares consumers the need to prove only what the manufacturer can know — the "state of mind" of the corporation. Because manufacturers have all of the technological and financial advantages in their contests with injured consumers, proving such state of mind can be an insurmountable difficulty for consumers. In addition, strict liability represents a critical policy choice: the one who is responsible — even if not negligently so — for bringing a dangerously defective product to the marketplace should compensate anyone injured by the product; the injured person should not go without compensation. Finally, this approach maximizes incentives for making safer products.

Advocates of "fault-based standards" invariably promote alterations in the law — ranging from abolition of strict liability to the erection of negligence-oriented defenses — that would undermine the vital features of the strict liabiliy doctrine. Such alterations would either force injured victims to prove aspects of manufacturer conduct or would simply cut off manufacturers' liability even when they had produced dangerously defective products. In any case, such changes would invariably leave some victims of dangerously defective prodiucts without compensation and would undercut safety incentives.

12. The Kasten-Lugar Amendments

Senators Kasten and Lugar have already announced their intention to introduce two amendments to S.2760 when it is considered by the full Senate later this month. Congressional Record, August 15, 1986, pp. 12003-4. Both amendments would restrict the rights of consumers injured by dangerously defective products to obtain compensation for their injuries. Such amendments have no place in federal legislation, particularly in legislation that purports to enhance the ability of wrongfully injured victims to obtain adequate compensation for their harms.

The first of these provisions would bar liability when the product involved had been used or altered in an unforeseeable or unreasonable way. Current law, however, holds manufacturers liable for all uses or alterations of their products so long as they are foreseeable. Such a requirement is indispensable to maintaining product safety since it compels manufacturers to take into account foreseeable uses and alterations when they design their products.

Frequently, children, for example, are responsible for unreasonable, but nevertheless foreseeable, uses of consumer products. In Larue v. National Union Electric Corp., 571 F.2d 51 (1st Cir. 1978), a young boy was mutilated while playfully riding on the wheeled cannister component of household vacuum cleaner. The court held the manufacturer liable because the injury, caused by exposed fan blades, could have been prevented by the readily feasible inclusion of a safety device. The court ruled that the manufacturer should have foreseen that the blades were a potential source of injury, including injury to children toying with the machine. A provision foreclosing compensation to those injured in foreseeable and preventable accidents has no place in purportedly compensation-promoting legislation.

The second provison would deny compensation to those consumers injured by dangerously defective products if at the time of manufacture "knowledge of the defect was not reasonably available or obtainable in light of existing scientific, technological or medical information." In many ways such an amendment would be superfluous. In all but the smallest handful of jurisdictions, issues of feasiblity are central to a court's determination of whether or not a product is defective and the manufacturer strictly liable for injuries caused by the product. However, codification of an "unknowability" defense would seriously undermine the objectives served by the doctrine of strict liability, which many proponents of tort legislation, including the Reagan Administration, have acknowledged should continue to apply in product cases.

First, such a defense would create an incentive that cut against those for greater safety, since manufacturers would be rewarded for not expanding the boundaries of "knowability". The conduct of the asbestos industry highlights the threat to safety that this policy would represent. In the early years of the asbestos-worker litigations, the industry was able to use the "knowability" defense (*i.e.*, under negligence) by drawing a narrow distinction between scientific studies involving employees who worked with asbestos in its raw form and those who worked with it when it was an element of a compound or mixed material. Despite abundant evidence that asbestos dust poisoned those who worked with pure asbestos, the industry was able to argue successfully in court that it was not liable to those who had used asbestos compounds. In effect, the industry was permitted to argue that it had no legal obligation to examine and question a study suggesting that asbestos-compound workers were in no danger from asbestos in light of the strong evidence about its effect on those who worked with pure asbestos. It was not until it was discovered that the industry had long since conducted — and suppressed — studies revealing the dangers to asbestos-compound workers, that those worker-plaintiffs were able to overcome conclusively the industry's "knowability" defense.

Second, strict liability essentially requires a manufacturer to compensate people injured by its dangerously defective products precisely because it is the manufacturer — not the consumer — who is responsible for putting the dangerously defective product into the marketplace. For this reason, it is the manufactuer — not the consumer — who should bear the costs, such as those related to injuries, that the dangerously defective product creates.

Codification of the "knowability" defense would reverse this equation. Consumers injured by dangerously defective products would be forced to go without compensation simply because the products' defects were "unknowable" at the time of manufacture. It would be consumers, and not manufacturers, who would be forced to bear a fundamental entrepreneurial risk of manufacturing by suffering uncompensated injuries. Such consumers would be shut out of the compensation system of S.2760, an effect that would clash with the purported goals of the bill.

Indeed, across-the-board alterations of the tort system such as those advocated by the Reagan Administration and other proponents of legislation — blanket imposition of a negligence standard, caps on recoveries or wholesale expansion of defenses — would undermine both the rationality and workability of any system designed to expedite settlements. Not only would changes such as these devastate the vital safety and compensation policies of current law but they would provide manufacturers an irresistable temptation to reject settlements for the purpose of challenging claimants in a tort system rendered vastly more favorable to manufacturers by precisely these changes. As a result, many consumers injured by dangerously defective products would simply not be able to secure adequate settlements.

CONCLUSION

Despite the declared intentions of its authors, S. 2760 would only re-create, rather than solve, the problem of undercompensation for victims of dangerously defective products. While Title II would facilitate manufacturers' illegitimate impulses to undercompensate greviously injured victims and lessen their own financial responsibility for the injuries their products caused, it would offer precious little assistance to victims who wished to pursue their own strong incentives to settle their claims. At the same time, the bill would rob victims bringing claims against multiple defendants of the assurance of full compensation after winning their cases.

We are committed to finding a way to promote prompt and adequate compensation to injured victims. For the reasons stated above, however, and because of the unwarranted changes the bill would make in substantive tort law, we must oppose passage of S. 2760.

Consumer Federation of America

TRENDS IN LIABILITY AWARDS: HAVE JURIES RUN WILD?

EXECUTIVE SUMMARY

THE CONCERN ABOUT JURY AWARDS

Current efforts to change liability laws have been stimulated in part by the belief that, in the past decade, juries have dramatically and unjustifiably increased awards in civil trials precipitating a crisis of liability insurance. The data used to demonstrate the increase in awards has been challenged on a number of grounds -- a failure to take inflation or population growth into account -- and a controversy has raged around the use of averages versus medians to describe jury behavior.

This paper presents a new view of jury awards by defining a comprehensive framework for assessing changes in jury behavior. It identifies and measures a variety of economic and social conditions that can be expected to affect jury awards. It shows that when these basic changes in society are taken into account, awards have not increased beyond reasonable expectations, even when simple averages for the most highly publicized types of cases -- medical malpractice and product liability -- are considered.

> Far from running wild, juries have adjusted their awards to reflect the basic social and economic changes that have taken place in the past decade. They are making awards to their peers that are consistent with the increasing economic output of society and value placed on life.

HOW JURIES CAN BE EXPECTED TO BEHAVE

Juries can be expected to decide the magnitude of awards according to their experience with inflation and their knowledge that income and productivity grow over time and that medical costs have increased sharply in recent decades.

The number of cases brought can be expected to reflect the number of people in society and the nature of the risks to which they are exposed. Population, workforce participation, travel, the incidence of hazardous materials, and better scientific understanding of the health effects of those materials all should affect the number of cases.

> The trend in these factors over the past several decades leads to a reasonable expectation that there would be an increase in the number of cases and the magnitude of awards.

Table ES-1 outlines a few of the basic economic and social conditions that should affect jury awards, while Table ES-2 presents empirical estimates of the magnitude of change in the past decade for several of the most important of these conditions.

ECONOMIC AND SOCIAL CHANGE

In the 1975-1984 period inflation was 83 percent. This one factor alone is of overwhelming importance. With inflation having such an impact on the value of the dollar, any meaningful comparison between awards must be made in constant (real) dollars.

In addition to inflation, other important economic and social changes took place between 1975 and 1984 which should have had a significant impact on awards --

real income grew 17 percent,

life expectancy increased 3 percent, and

elderly income grew by 10 percent compared to national average income.

Between 1975 and 1984 these three factors yielded an expected increase in lifelong income above and beyond inflation of between 25 and 30 percent. Since juries are expected to make awards on the basis of an estimate of economic loss, these factors should have influenced their decisionmaking process.

In addition to economic loss, juries make awards for medical costs. These are a large component of awards -- averaging about 25 percent of total awards in the 1970s. In the past decade medical costs were rising much faster than inflation.

Overall, between 1975 and 1984 health care costs increased by 23 percent more than inflation while hospital costs increased almost 56 percent more than inflation.

COMPARING ECONOMIC AND SOCIAL CHANGE TO JURY AWARDS

For the severe injury types of cases that have been the focal point of recent discussion, the hospital cost index and the high estimate of economic impact are most appropriate. Using these, an index of expected increases in awards was constructed.

We expect about a 55 percent increase in the medical cost component of awards and about a 30 percent increase in the non-medical component, over and above the rate of inflation.

Overall, we would expect about a 36 percent increase in awards, over and above inflation.

Combining inflation and real changes, we expect a 150 percent increase in awards to have taken place between 1975 and 1984.

Figure ES-1 shows the combined effect of inflation, real economic growth, increasing life expectancy, enhanced elderly income, and real medical inflation on expected average awards, for medical malpractice, product liability and wrongful death. It compares current dollar awards to awards stated in constant dollars and to our estimate of how awards should have grown between 1975 and 1984.

Expressed in current dollars, awards for medical malpractice and wrongful death increased by about 200 percent, while awards for product liability increased by about 150 percent. About half of this was inflation. Therefore real increases were much smaller. Moreover, there has been little unexpected change in awards. We conclude that in the period between 1975 and 1984

there has been virtually no increase in product liability awards above reasonable expectations about jury decisionmaking; and

there has been a modest (15 to 20 percent) increase in medical malpractice and wrongful death awards.

Awards in cases involving less severe injuries and non-bodily injuries have increased even less over the past decade.

MEDIAN COMPARED TO AVERAGE AWARDS

Changes in median awards are generally smaller than changes in average awards (see Figure ES-2). For a number of reasons medians appear to be preferable as a measure of jury behavior for the type of data and analysis presented as part of the current policy debate.

Medians represent the typical award. They show what juries are likely to do -- what they do most often. Averages, which are higher than medians in this case, indicate that juries occasionally make much larger awards than they typically do. Under some circumstances averages are a better reflection of the economic burden resulting from jury awards. They give a better measure of the overall magnitude of awards.

That is not the case with civil jury awards, however, because the largest awards are much more likely to be reduced at some later time.

Moreover, as presented, the data also does not include those cases in which the defendant won. It does not present an average of awards across all trials -- it excludes all of the zeros. Therefore, the data is not a measure of jury behavior, it is a measure of behavior, only after juries have found for the plaintiff.

Finally, much of the data used in recent analyses is also based on a newspaper clipping service. This approach to data gathering is much more likely to count large awards than small awards. The distortion resulting from this bias in the data will affect the average much more than the median.

We conclude that medians are a better measure of the civil liability system because

averages are misleading as a measure of the economic burden caused by civil liability,

the averages presented are misleading as a measure of the outcome of trials, and

the data underlying most of the averages probably overstates actual awards.

This observation on the appropriateness of the medians reinforces our conclusion, based on averages, that juries have not run wild.

These conclusions are also confirmed when we observe that insurance claims have increased only slightly as a percentage of Gross National Product -- from 3.4 percent of gross national product in 1975 to 3.6 percent in 1984.

TABLE ES-1

SOCIAL AND ECONOMIC CHANGES AFFECTING JURY AWARDS

SOURCE OF CHANGE	REASON FOR IMPACT ON JURY AWARDS
Inflation	Dollar values must be stated in real terms so that real changes are analyzed correctly.
Population	The nature and make up of the population plays a role similar to that of inflation. It is a fundamental source of change that multiplies behaviors automatically as the number of people in society increases.
Real Income Growth	Above and beyond inflation, we must consider real income growth. Injured parties suffer greater losses if their earning power is greater.
Life Expectancy	Increasing real incomes are also associated with lengthening lifespans. The loss suffered by an injured party endures longer.
Medical Inflation	The costs of medical care have increased over and above the rate of inflation because the real income of resources used in medical care has increased and, as scientific knowledge increases, more treatment and more prolonged treatment have become possible.
The Nature of Risk	The nature of risk in society is an important determinant of both the number of cases and the size of awards. If risks increase, we would expect the number of cases to increase, and perhaps the severity of injuries to increase. Improvements in safety may work in the opposite direction.

The Nature of Activity	If more individuals engage in more risky activities, they can be expected to incur greater risk and generate more cases. The willingness of individuals to engage in certain types of activities (i.e. go into the workplace) is founded on the fact that it generates more well-being (output or leisure). The increase in the absolute level of wellbeing is followed by an increase in the absolute level of potential costs.
Scientific Knowledge	Scientific knowledge may also increase the number of cases. As the causes of injury and illness become better known, more cases may develop. The costs of injury and illness are not created by scientific knowledge, but are revealed by it. These costs always existed, they simply were hidden by ignorance. Once they become known, the social mechanisms to reduce or eliminate such costs should be expected to operate.
Access to Law	Increasing access to law may also increase the number of cases. As society becomes wealthier more individuals have the wherewithal (economic resources, education, time) to pursue their claims. Their ability to pursue claims does not create new wrongs, it simply reveals them in another forum. The injuries and costs existed in the past, but they were borne entirely by individuals. They were costs imposed on individuals, which can be reduced in the aggregate through the social mechanism of the tort system.

TABLE ES-2

MEASURES OF SOCIAL AND ECONOMIC CHANGES
AFFECTING JURY AWARDS:
1975-1984

ELEMENT OF CHANGE	MAGNITUDE OF CHANGE (In Percent)
GENERAL INFLATION[a]	83
REAL INCOME GROWTH[b]	17
INCREASE IN LIFE EXPECTANCY[c]	3
ENHANCEMENT OF ELDERLY INCOME[d]	10
REAL MEDICAL COSTS[e]	23
REAL HOSPITAL COSTS.[e]	56

SOURCES:

a/ Council of Economic Advisors, Annual Report:1986 (Washington, D.C., 1986], Appendix B, Table B-26, for per capital income. U. S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1986 (Washington, D.C.], Tables 756 and 868, for family income. Rates of change are the same for both.

b/ U. S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1986 (Washington, D.C.], Tables 756 and 868.

c/ U. S. Department of Commerce, Bureau of the Census, Demographic and Socioeconomic Aspects of Aging in the United States (Washington, D.C.: Current Population Reports p-23: No. 138], Table 8-4. Assumes constant rate of growth 1975 to 1984.

d/ U. S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1986 (Washington, D.C.], Table 16.

e/ U. S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1986 (Washington, D.C.], Table 797.

FIGURE ES-1
COMPARISON OF CURRENT DOLLAR AND
CONSTANT DOLLAR EXPECTED AWARDS

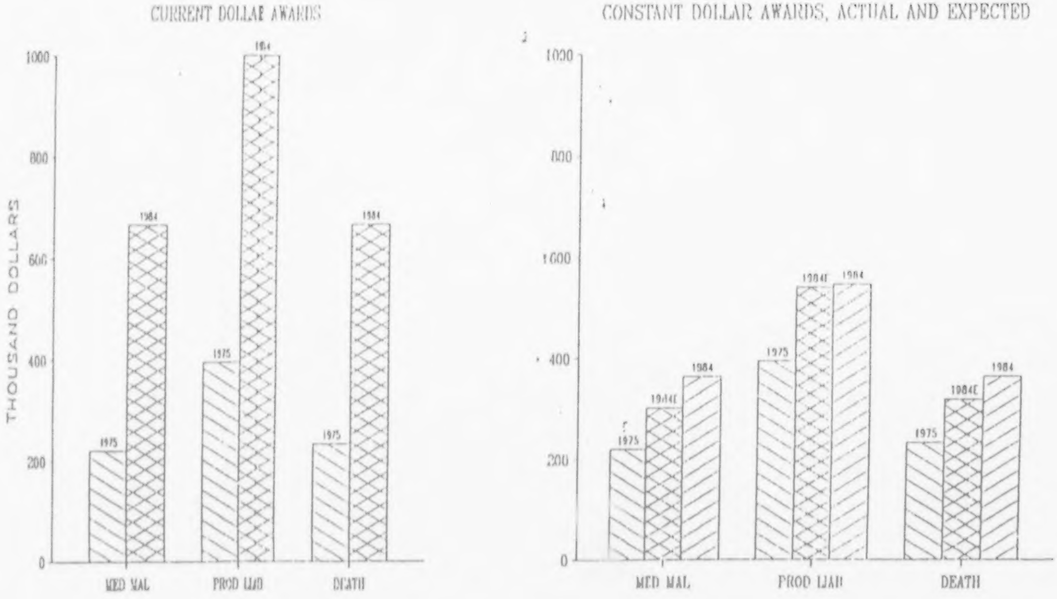
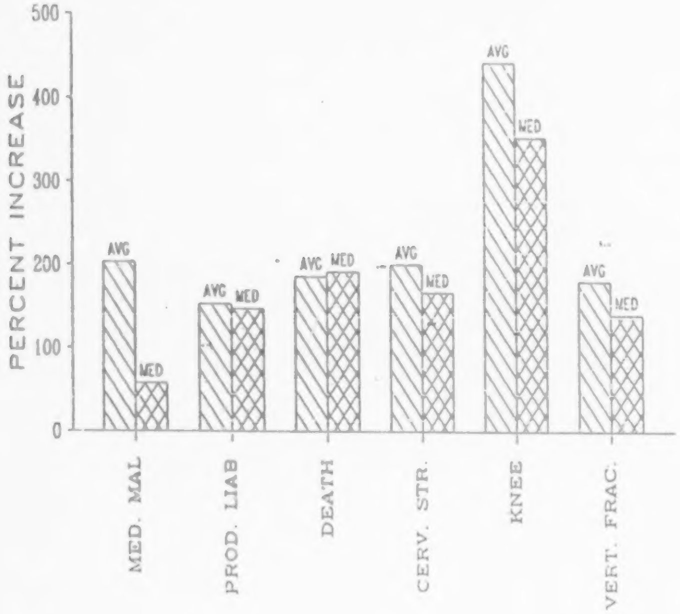


FIGURE ES-2

INCREASES IN AVERAGE AND MEDIAN AWARDS: 1975-84



I. INTRODUCTION

THE CONCERN OVER JURY AWARDS

Current efforts to change liability laws have been stimulated in large part by the belief that, in the past decade, juries have dramatically and unjustifiably increased awards in civil trials precipitating a crisis of liability insurance.1/ The data used to demonstrate the increase in awards has been challenged on a number of grounds -- a failure to take inflation or population growth into account -- and a controversy has raged around the use of averages versus medians to describe jury behavior.2/

This paper presents a new view of jury awards by defining a comprehensive model for assessing changes in jury behavior. It identifies and measures a variety of economic and social conditions that have affected jury awards. It shows that when these basic changes in society are taken into account, awards have not increased beyond reasonable expectations, even when simple averages for the most highly publicized types of cases -- medical malpractice and product liability -- are considered.

> Far from running wild, juries have adjusted their awards to reflect the basic social and economic changes that have taken place in the past decade. They are making awards to their peers that are consistent with the increasing economic output of society and value placed on life.

Awards have increased, but not out of proportion to economic and social change.

HOW JURIES SHOULD BE EXPECTED TO BEHAVE

In order to assess changes in jury behavior it is important to recognize that if the jury system is supposed to reflect the nature of society -- which is the fundamental premise of the concept of a trial by one's peers -- then changes in jury awards are not only to be expected, they are absolutely necessary.

Juries can be expected to decide the magnitude of awards according to their experience with inflation and their knowledge that income and productivity grow over time and that medical costs have increased sharply in recent decades.

The number of cases brought can be expected to reflect the number of people in society and the nature of the risks to which they are exposed. Population, workforce participation, travel, the incidence of hazardous materials, and better scientific understanding of the health effects of those materials all should affect the number of cases.

> The trend in these factors over the past several decades leads to a reasonable expectation that there would be an increase in the number of cases and the magnitude of awards.

OUTLINE OF THE REPORT

This report initiates a series of studies CFA is conducting of liability law. It focuses on indicators of social and economic change that are measured at the same level as the data used to portray awards as being out of control. In subsequent analyses we will examine more micro level data and outline the necessary components of a full cost-benefit analysis of the impact of our system of civil law.

Section II of this report presents a brief example of the main thrust of our argument in simple terms to make the point that jury awards should have increased in the past several decades.

Section III identifies a series of social and economic changes that should be taken into account in assessing the behavior of juries and the legal system.

Section IV reviews the empirical evidence on the extent of economic and social change that should have influenced jury awards.

Section V compares these estimates of expected change to the actual changes in awards that occurred.

Section VI presents a different view of this same issue using expenditures on insurance, insurance claims and gross national product.

II. A NOT SO HYPOTHETICAL EXAMPLE

To illustrate our general argument this section presents an example of the obvious and subtle ways in which lifelong income grows over time.

MEASURING ECONOMIC LOSS

Consider yourself a juror participating in a case in which a 40 year old household head has been severely injured. The jury has decided that the plaintiff is correct in the charge of liability and that the earning capacity of this person has been completely undermined. How do you decide the amount of economic loss involved?

You would certainly start from an estimate of earnings. You would try to estimate the likely lifetime earnings, including income growth during the employment career and retirement income.

You might well base your projections of what this individual would earn on your personal experience over the past ten years. Your general experience indicates that incomes grow by a certain amount per year.

Moreover, when people retire they continue to enjoy an income that is reflective of their occupations and their investments and pensions during their working years. You would add the stream of income from work and retirement to arrive at an estimate of the economic damage done.

Let us assume that you decide to estimate lifelong income according to the following principles.

> Determine the base income as the national average family income in the year of the trial.
>
> Increase expected income at the rate of growth of income that has occurred in the last ten years.
>
> Assume that the retirement income of the elderly household head is equal to the average income for households with elderly heads, in the year of the trial.

> Assume national average life expectancy in the year of the trial and that increases in life expectancy add to the years of retirement, not to the years of work.

CHANGES THAT AFFECT LIFELONG INCOME

If you apply exactly the same four principles in 1965, 1975 and 1984, you must use very different estimates for each of these principles.

Table 1 shows the actual national average figures for each of the three moments in time when the jury is making its decision.

In 1965 the average family income was about $7,300. In 1975 it was $14,400. By 1984 family income had grown to $27,500. You certainly would not assume that a family earning $27,500 in 1984 should be awarded for its losses suffered as though it was earning only $7,400.

Table 1 also shows per capita income figures in the three years. Per capita income was $2,500 in 1965, $5,300 in 1975 and $11,300 in 1984. The percentage increase is about the same as family income.

In 1965 the average increase in family income in the previous ten years (1955-1965) had been about 3.9 percent per year, which includes both inflation and real growth. You might reasonably project that this would continue for several decades into the future.

In 1975 the average increase in family income in the previous ten years had been 7.5 percent (which includes a lot more inflation). Again you might reasonably project this into the future.

In 1984 the average increase in family income in the past ten years had also been 7.5 percent (which includes much more inflation). Again, you might reasonably project this into the future.

In 1965, the income of households whose heads were elderly (more than 65 years old) was only about 51 percent of the national average income. You might expect this relationship between elderly and average income to hold in the future, since that is what you are familiar with.

In 1975 the average income of households headed by elderly was 58 percent of the national average. This increase might have taken place because households are richer in general. Therefore, they may be able to make more investments during their working life, or build up bigger pensions, or are healthier and able to perform more part-time work during retirement.

TABLE 1

NATIONAL AVERAGE CHARACTERISTICS AFFECTING THE ESTIMATION OF LIFELONG INCOME

CHARACTERISTIC	1965	1975	1984
1. PERCAPITA INCOME ($000)	2.5	5.3	11.3
2. FAMILY INCOME ($000)	7.3	14.4	27.5
3. INCOME GROWTH PREVIOUS 10 YEARS	3.9	7.5	7.5
4. INCOME OF HOUSEHOLDS HEADED BY ELDERLY AS A PERCENT OF NATIONAL AVERAGE	.51	.58	.64
5. YEARS OF LIFE EXPECTANCY AFTER 40	32	33	34

SOURCES:

1. Council of Economic Advisors, *Annual Report: 1986* (Washington, D.C., 1986], Appendix B, Table B-26.

2. U. S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1986* (Washington, D.C.], Tables 756 and 868.

3. U. S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1986* (Washington, D.C.], Tables 756 and 868.

4. U. S. Department of Commerce, Bureau of the Census, *Demographic and Socioeconomic Aspects of Aging in the United States* (Washington, D.C.: Current Population Reports p-23: No. 138), Table 8-4. Assumes constant rate of growth 1975 to 1984.

5. U. S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1986* (Washington, D.C.], Table 16.

By 1984, the income of households headed by the elderly is estimated to have grown to equal about 64 percent of the national average (more progress in making life long investments, accumulating pension benefits and being healthier longer).

You must also estimate how long the household head would have lived, if a normal expected lifespan had taken place. In 1965 the life expectancy of a forty year old was 31.5 years. In 1975, it was 33.1 years. In 1984 it was 34.2 years.

Making a good faith effort to estimate the expected lifelong income which had been disrupted, you would combine the knowledge and experience embodied in these observations. With this knowledge, you would reach a very different conclusion, if you were deliberating in 1965 than 1975 or 1985, *even though you applied exactly the same principles in each case*.

ESTIMATES OF LIFELONG INCOME

Let us consider two approaches to estimating lifetime income. The first projects the total stream of income that will be earned over the entire remaining life of the individual. It includes inflation and real growth of income. This would be the most familiar method of figuring future income. The second method takes inflation out (i.e. estimates income in constant dollars) and states earnings in present value terms. The latter is closer to the method that would be applied in the courtroom. The two methods lead to essentially the same conclusion -- awards should have increased dramatically.

Starting from the national average income, assuming the rate of growth that had occurred in the previous ten years, assuming elderly income equal to the percentage of national income that occurred in the year of the trial, and using the life expectancy that occurred in the year of the trial, you would estimate lifetime earnings of

$308,000 in 1965;
$1,052,000 in 1975; and
$2,164,000 in 1984.

Inflation, economic growth and social change will have dramatically changed the dollar figure, even though exactly the same principles were applied. If juries are supposed to award those who are injured based on their economic loss, then the award in 1985 should be more than double the award in 1975 and almost eight times as large as in 1965.

Although the above scenario reflects a common sense approach to estimating lifelong income, juries make their decisions in a somewhat different manner. Because awards are lump sum payments intended to approximate lifelong earnings, juries make awards in the present value equivalent of lifelong income.

Because awards are given in the present, income streams should be projected in constant, not current dollars. Individuals may be assumed to be able to invest their awards and keep up with both inflation and the real growth in income. An assumption of no growth in income offsets the discounting of future dollars. In this case, juries can take annual earnings in constant dollars and sum them up, either including or excluding an adjustment for retirement income.

Under these assumptions, the total dollar figure is smaller, because future inflation and growth have been excluded, but it still reflects a dramatic increase in awards over time. Under these assumptions, including an adjustment for retirement, the award would be

$191,000 in 1965;
$398,000 in 1975;
$796,000 in 1984.

The above hypothetical numbers are not mere hypotheticals. Because they are based on national averages, they are likely to be a good representation of the circumstances of victims. They are very reasonable approximations for the assumptions that jurors deciding cases in each of those years, were likely to make. Figure 1 shows the cumulative income estimates resulting from the assumptions discussed above -- assuming a 20 year work life after age forty, a retirement adjustment and including inflation and real growth. Figure 2 shows the cumulative lifelong income -- excluding inflation and growth. The increases are quite dramatic in both cases. No matter which methodology one applies, a failure to consider inflation and real changes in earnings and life expectancy would be a major flaw.

FIGURE 1

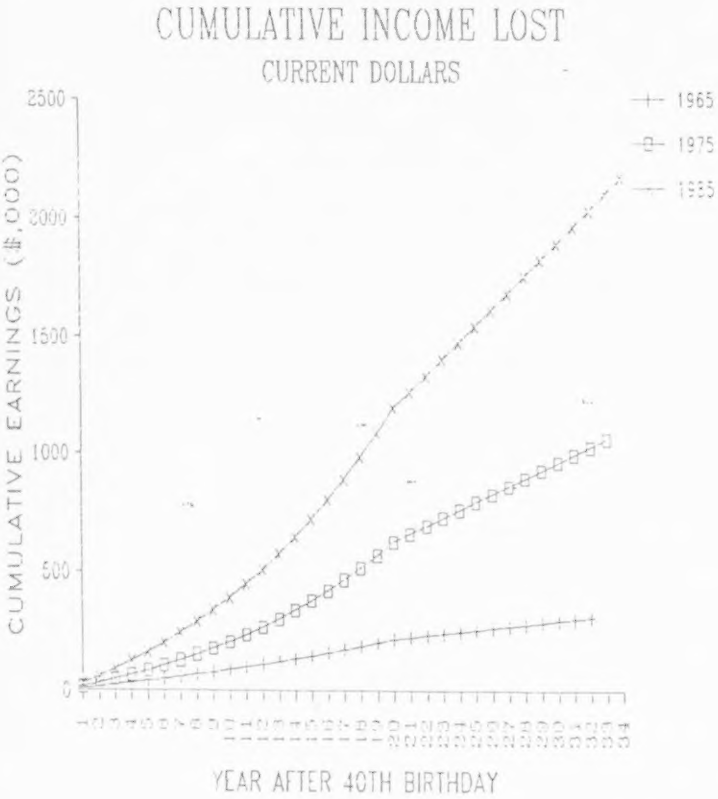
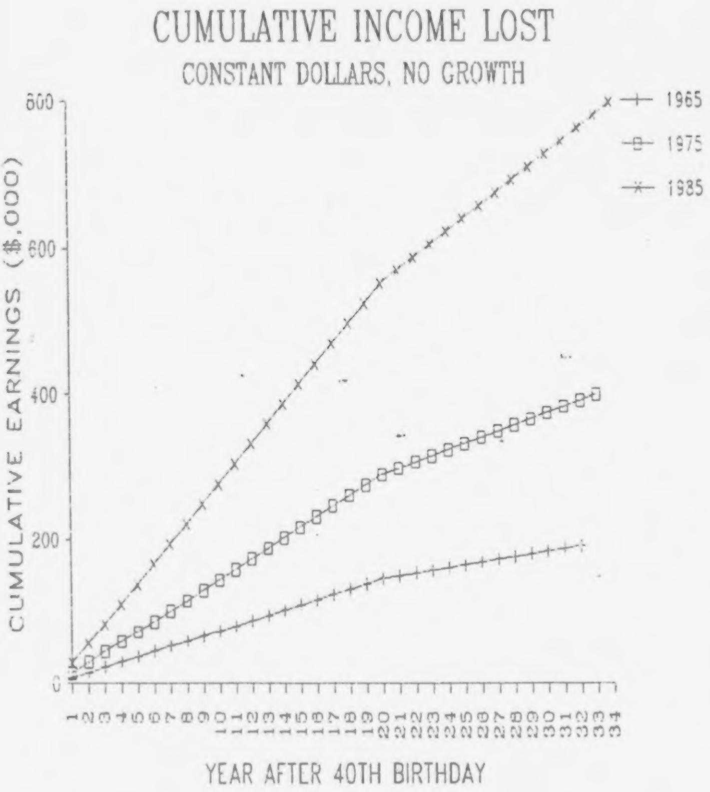


FIGURE 2



III. A FRAMEWORK FOR UNDERSTANDING THE NUMBER OF CASES AND THE SIZE OF JURY AWARDS

In this section we develop the analytic basis for understanding the number of cases and the magnitude of awards in the civil justice system.

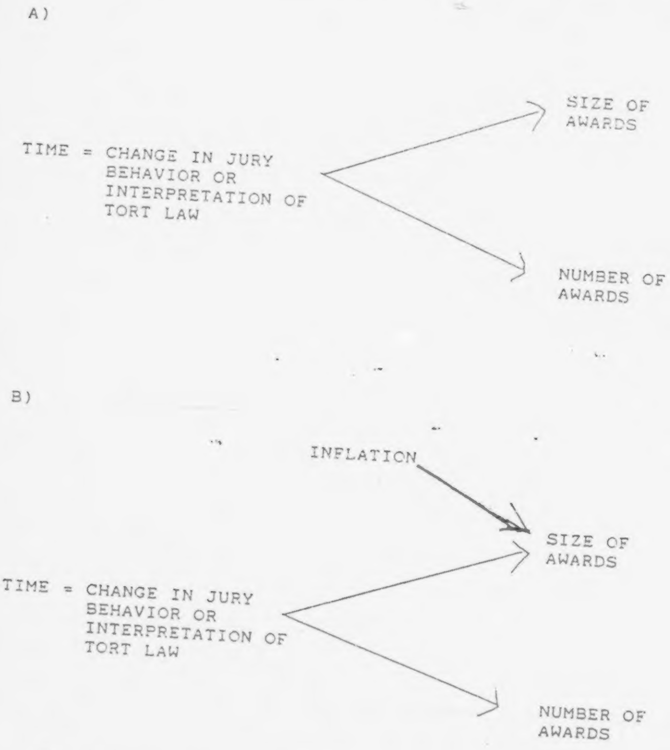
AN UNACCEPTABLY SIMPLISTIC APPROACH

Much of the recent argument that juries have dramatically and unjustifiably increased awards rests on a very simplisitc underlying model (as depicted in Figure 3a). The pattern of cases and awards is presented over the past decade. Changes that have taken place are attributed primarily to changes in the law and jury behavior. No other factors are taken into account in the model.

In the past twenty years the purchasing power of the dollar has declined by two thirds, and in the past ten years the purchasing power of the dollar has been cut in half.3/ Put the other way, a dollar awarded in 1985 has half the value of a dollar awarded in 1975 and one-third the value of a dollar awarded in 1965. It is obvious that one must deflate the dollar value of reported settlements by at least this much to get a reasonable estimation of the true value of the settlements.

However, merely deflating the dollar value of awards to take account of inflation (as in Figure 3b), is not enough. Over the past two decades many other changes have taken place in society. These changes must also be taken into account in judging the behavior of juries and litigants.

FIGURE 3
THE DEPARTMENT OF JUSTICE'S SIMPLISTIC MODELS OF CHANGE


A)
TIME = CHANGE IN JURY BEHAVIOR OR INTERPRETATION OF TORT LAW
SIZE OF AWARDS
NUMBER OF AWARDS
B)
INFLATION
SIZE OF AWARDS
TIME = CHANGE IN JURY BEHAVIOR OR INTERPRETATION OF TORT LAW
NUMBER OF AWARDS

For example, the productivity of workers in society has increased dramatically over the past two decades. Between 1965 and 1975 output per hour of work increased by over 18 percent, and between 1975 and 1984 it increased by another 10 percent. Real incomes have increased to reflect that increase in productivity.4/

Therefore, the loss of income suffered by an interruption of work in 1985 is larger in dollar terms not only because of inflation, but also because of increases in real productivity.

Similarly, people have longer lifespans today, so the loss will be even larger compared to two decades ago.5/

If juries are making awards on the basis of economic earning power, one would expect that they would award a person much more today than ten or twenty years ago because that person produces and consumes more today in real terms and lives longer.

Thus, we should not only deflate award amounts so that the comparisons are made in dollars of equal purchasing power, we should also inflate our expectations about awards to take into account increases in productivity and longer lifespans.

Similar factors have operated to increase the absolute number of cases.6/ Not only should the count of the number of cases be deflated by population growth, but the behavior of the population must be taken into account.

While population has increased by 23 percent in the past two decades, the labor force has increased by 52 percent. Labor force participation is a very important determinant of litigation because one of the primary places in which people are exposed to hazards is in the workplace. Therefore we might expect the number of cases in the courts to be more closely related to the size of the work force than to population.7/

As people drive more and fly more they may incur greater risks. As people are exposed to different and more hazardous materials either because such materials are more prevalent or people are more likely to come into contact with them, they risk greater injury or illness. The increase in the magnitude of risks to which people are exposed leads to an increase in the number of cases and may increase the severity of injuries they suffer as well.8/

These are but a few of the social and economic changes which occurred during the past two decades that must be considered if the behavior of juries and the legal system is to be properly evaluated.

GOOD REASONS FOR CHANGES IN THE NUMBER AND MAGNITUDE OF AWARDS

A more sophisticated approach would at least try to identify the various social and economic factors operating in the past several decades which might be good reasons to expect changes in the number and magnitude of awards.

As a starting point, we suggest the following set of factors.

1. Inflation: Dollar values must be stated in real terms so that real changes are analyzed correctly.

2. Real income growth: Above and beyond inflation we must consider real income growth. Injured parties suffer greater losses if their earning power is greater. Over time earning power has increased.

3. Life expectancy: Increasing real incomes are also associated with lengthening lifespans. The loss suffered by an injured party endures longer if the lifespan is longer.

4. Medical inflation: The costs of medical care have increased over and above the rate of inflation. This is a particularly important factor in severe injury cases.

A number of causes can be cited for the increase in medical expenses. First, the real cost (income) of resources used in medical care has increased. Second, as scientific knowledge has increased, more treatment and more prolonged treatment have become possible. Thus, both increasing wealth and increasing knowledge lead to increasing medical costs.

5. Severity of injury: Over time it is possible that the severity of injuries in society changes. Depending on the nature of risk, an increase in the severity of injuries may result in an increase in the size of awards. Aggregate statistics that do not take account of the nature of injuries may be misleading.

6. The nature of risk in society: The nature of risk in society is not only an important determinant of the size of awards, it is also a determinant of the number of cases. If risks increase, we would expect the number of cases to increase. Of course, improvements in safety may work in the opposite direction.

7. The nature of activity in society: Closely related to the nature of risk in society is the nature of social and economic activity. If more individuals engage in more risky activities, they can be expected to incur greater risk and generate more cases.

It should be stressed that the willingness of individuals to engage in certain types of activities (i.e. go into the workplace) is founded on the fact that it generates more well-being (output or leisure). The increase in the absolute level of wellbeing is followed by an increase in the absolute level of potential costs associated with the risk of injury.

8. Scientific knowledge: Scientific knowledge may also increase the number of cases. As the causes of injury and illness become better known, more cases may develop.

It is important to recognize that the costs of injury and illness are not created by scientific knowledge, but are revealed by it. Those costs always existed, they simply were hidden by ignorance. Once they become known, the social mechanisms to reduce or eliminate such costs should be expected to operate.

9. Access to law: Increasing access to law may also increase the number of cases. As society becomes wealthier (among other things) more individuals may have the wherewithal (economic resources, education, time) to pursue their claims. It must be stressed that their ability to pursue claims does not create new wrongs, it simply reveals them in another forum. The injuries and costs existed in the past, but they were borne entirely by individuals. They were costs imposed on individuals, which can be reduced in the aggregate through the tort system.

10. Population: We have already noted the important role that increasing population, as well as the nature and make up of the population, plays in the analysis. Population plays a role similar to that of inflation. As the number of people increases, certain behaviors are multiplied automatically.

Figure 4 summarizes this more complex understanding of the economic and social forces affecting jury decisions and the civil liability system.

APPROACHES TO EMPIRICAL ANALYSIS

As the next section shows, at the aggregate level of data used in most recent analyses of jury behavior, the most important elements in this model of economic and social change are easily measurable and susceptible to analysis.

Several of the factors which should affect juries and courts are attributes of individuals or individual cases and can be measured at that level. Others are primarily societal characteristics which are likely to influence private decisions either to file a case or in the magnitude of the award offered. It would be possible to compile a large data base on individual cases and to ascertain what part each factor played in aggregate patterns of change over time. Unexplained change could be attributed to changes in jury behavior.

Some efforts have been made to conduct part of such an analysis. However, in this paper we will conduct a more aggregate type of analysis which responds to the aggregate analysis presented by others. We construct indices for a number of the factors which should affect jury behavior to estimate the extent to which there is a correlation between overall changes in society and overall changes in the magnitude of awards.

In essence, we construct a more comprehensive plausible alternative explanation for the changes in jury behavior.

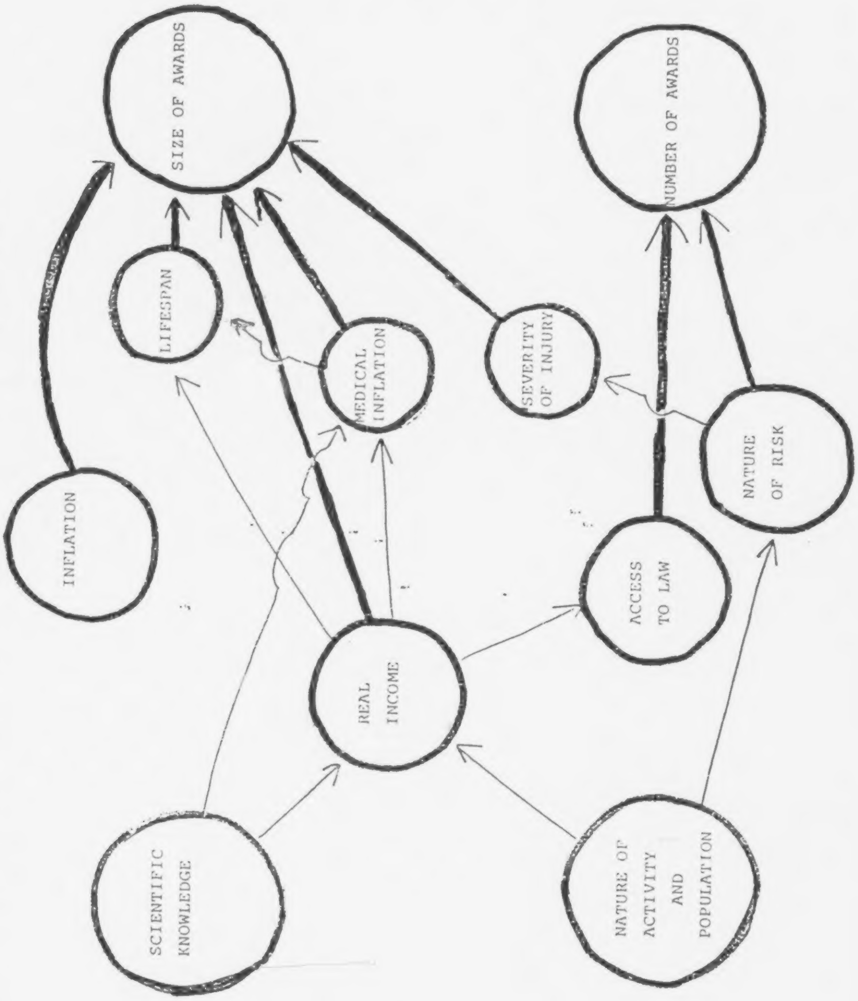


FIGURE 4: A MORE COMPLETE MODEL OF ECONOMIC CHANGE AND THE CIVIL JURY SYSTEM

IV. ECONOMIC CHANGE AND JURY AWARDS

In this Section we construct an index of how much awards should have been expected to change over the past decade, given the social and economic changes that took place.

ECONOMIC AND SOCIAL CHANGE

Table 2 recapitulates in another form the economic factors discussed in the hypothetical example. It shows the rates of change between 1975 and 1984 for inflation, real growth of personal income (or family income), life expectancy and the enhancement of elderly household income.

In the 1975-1984 period inflation was 83 percent, real per capita income grew 17 percent, life expectancy increased 3 percent and elderly income grew by 10 percent (compared to national average income). Elderly income growth must be adjusted downward for purposes of estimating the impact on lifelong earnings because post-work life equals approximately one quarter of work life.

Table 2 presents two scenarios. In one scenario the increase in life expectancy is assumed to be added to the non-working period. In the second the increase in life expectancy is assumed to be added to the working life.

These four factors yield an expected increase in lifelong income of between 129 percent and 138 percent in a nine year period. Put another way, they lead to expectations of increases in real lifelong income of 25 to 30 percent. These are very large changes and they attest to the powerful force of social and economic change.

TABLE 2

MEASURES OF ECONOMIC CHANGE

COMPONENT OF GROWTH	ANNUAL CHANGE 1975-1984		CUMULATIVE LIFELONG INCOME EFFECT	
	LIFE EXPECTANCY DOES NOT INCREASE WORKING LIFE	LIFE EXPECTANCY DOES INCREASE WORKING LIFE	LIFE EXPECTANCY DOES NOT INCREASE WORKING LIFE	LIFE EXPECTANCY DOES INCREASE WORKING LIFE
1. INFLATION	83	83	83	83
2. REAL GROWTH OF INCOME	17	17	114	114
3. LIFE EXPECTANCY	3	8	120	131
4. ENHANCED ELDERLY INCOME	4	3	129	138

SOURCES: See Table 1.

The higher estimate of an increase of 138 percent is consistent with the overall increase of personal income of 138 percent during the 1975-1984 period.9/ Thus, our best estimate of expected increases in awards due to economic changes is 138 percent in current dollars, or 30 percent real.

HEALTH CARE COSTS

It goes without saying that increases in health care costs have also played a part in increasing awards. In the 1970s medical expenses comprised about one quarter of total awards and probably a larger share of larger awards.10/ As health care costs have grown they have pushed up overall awards.

Table 3 shows estimates of the increase in health care costs and various types of medical expenses. Overall, between 1975 and 1984 health care costs increased by 125 percent. In real terms it represents a 23 percent increase. This is close to the lower estimate of the increase in lifelong earnings developed in the previous section.

For hospital expenses, the increase was 184 percent. In real terms this is a 56 percent increase. This is considerably above the overall medical index and the lifelong earnings cost increases. In the more severe types of injury cases on which so much attention has been focused, the hospital inflation index would play a larger part.

AN OVERALL INDEX OF EXPECTED INCREASES IN AWARDS

If we assume that medical expenses were one quarter of the awards in 1975, we can construct a reasonable range for the expected increase in awards.

TABLE 3

MEDICAL INFLATION [1975 = 100]

YEAR	ALL COSTS	DOCTORS	HOSPITALS
1975	100	100	100
1983	112	108	162
1984	125	122	184

SOURCES:

U. S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1986 (Washington, D.C.), Table 797.

On the low side we assume the low increase in lifetime earnings and the average increase in all medical expenses. The low estimate is 128 percent (.75 X 129 + (.25 X 125) = 128). This is a real increase of 25 percent.

On the high side we assume the high increase in lifetime income and the high increase in medical expenses as defined by hospital costs. The high estimate is approximately 151 percent (.75 X 138 + (.25 X 184) = 151). This is a real increase of about 37 percent.

It should be stressed that these adjustments are essentially historic changes -- they do not entail projections of future growth or inflation. They do incorporate the qualitative change in life expectancy and enhanced elderly income that took place between 1975 and 1984. They are a moderate estimation of how social and economic change should affect awards.

V. JURY AWARDS COMPARED TO ECONOMIC AND SOCIAL CHANGE

This section compares the economic and social changes estimated in the previous chapter to changes in awards.

ECONOMIC CHANGE AND JURY AWARDS IN HIGH VISIBILITY CASES

Table 4 shows how the estimated changes in economic factors alone affect the perception of jury awards for three of the most frequently discussed types of cases -- medical malpractice, product liability and wrongful death.

Even average awards for these cases do not present the picture of juries run wild when considered in a more complete context of economic and social change. Published averages showed increases of between 153 and 203 percent. When these are deflated, the real increases are much smaller, between 39 and 66 percent.

We have just seen that real increases of 30 percent should have been expected on the basis of economic and social change. Thus, the increase in awards above expected change is in the range of 5 to 30 percent.

Table 5 shows the expected real awards compared to the actual real awards when both economic and medical cost factors are taken into consideration. Medical cost increases may well reduce the apparent increase in awards compared to expectations by another ten percentage points.

Because of the likely severity of injury in the types of cases on which attention has been focused, the higher estimate of expected increases is most appropriate. Figure 5 shows the combined effect of

TABLE 4

AVERAGE AWARDS 1975-1984: SIMPLE AVERAGES COMPARED TO 1984 ADJUSTED FOR ECONOMIC GROWTH AND CHANGE

	AS STATED BY THE DEPARTMENT OF JUSTICE (THOUSANDS OF CURRENT DOLLARS)			1984 FIGURE ADJUSTMENTS			
						EXPECTED AWARDS	
TYPE OF AWARD	1975	1984	PERCENT INCREASE	DEFLATED	PERCENT INCREASE 1975-84	BEST ESTIMATE	1975-84 INCREASE ABOVE EXPECTED
MEDICAL MALPRACT.	220	666	203%	365	66%	275	30%
PRODUCT LIABILITY	394	1000	153%	546	39%	512	7%
WRONGFUL DEATH	233	668	199%	365	57%	303	20%

SOURCES: U. S. Department of Justice, Report of the Tort Policy Working Groups on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February, 1986), pp. 37, 38, 5. and Table 2.

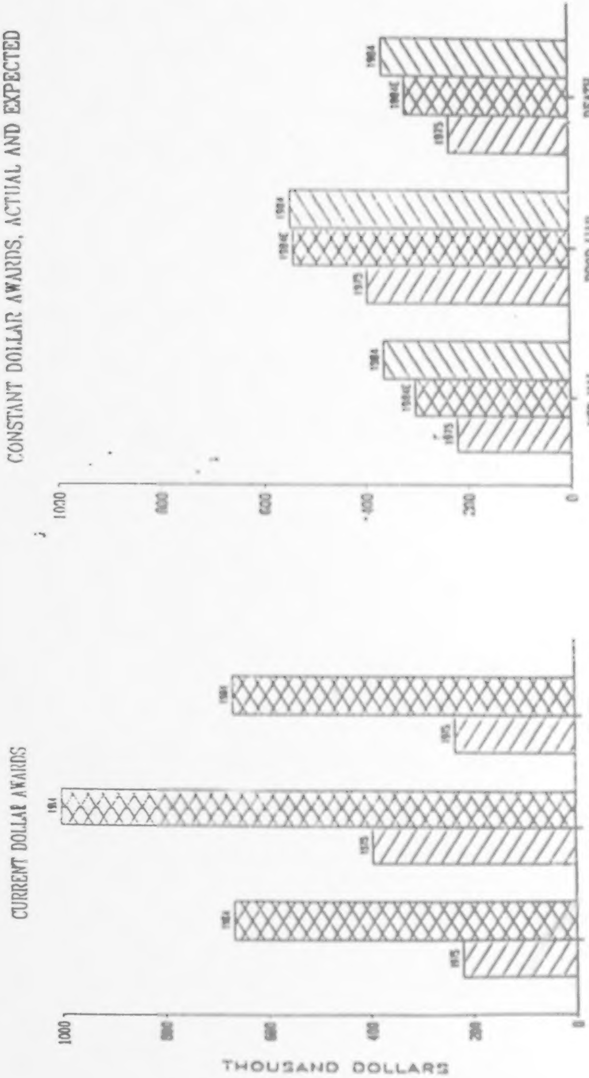
TABLE 5

AVERAGE AWARDS 1975-1984: SIMPLE AVERAGES COMPARED TO 1984 ADJUSTED FOR ECONOMIC GROWTH AND CHANGE AND MEDICAL COSTS

	AS STATED BY THE DEPARTMENT OF JUSTICE (THOUSANDS OF CURRENT DOLLARS)		1984 FIGURE ADJUSTMENTS		
				EXPECTED AWARDS	
TYPE OF AWARD	1975	1984	DEFLATED	LOW	HIGH
MEDICAL MALPRACT.	220	666	365	275	301
PRODUCT LIABILITY	394	1000	546	492	540
WRONGFUL DEATH	223	668	365	291	319

SOURCES: See Table 3.

FIGURE 5
COMPARISON OF CURRENT DOLLAR AND CONSTANT DOLLAR EXPECTED AWARDS



inflation, real economic growth, increasing life expectancy, enhanced elderly income, and real medical inflation on expected awards. It compares current dollar awards to awards stated in constant dollars and to our high estimate of how awards should have grown between 1975 and 1984.

Rather than demonstrating an explosion of damage awards, the available evidence shows that in the period between 1975 and 1984

> there has been virtually no increase (1 to 10 percent) in product liability awards above reasonable expectations about jury decisionmaking; and
>
> there has been a modest (15 to 20 percent) increase in medical malpractice and wrongful death awards.

OTHER TYPES OF AWARDS

The above analysis focuses on the three types of awards which have been at the center of recent debate. While these are important categories of awards, it should be recognized that they are only a part of the civil liability case load.

As Table 6 shows, there is no evidence that juries have run wild when other types of injuries and cases are considered. The survey of increases in Directors and Officer awards shows that they did not even keep pace with inflation, not to mention real economic growth and change. The changes in average awards for other types of injuries are similar to, and somewhat smaller than, those for the three categories discussed above. If anything, the analysis of medical malpractice, product liability and wrongful death overstates the general increase in awards.

TABLE 6

CHANGES IN AVERAGE AND MEDIAN AWARDS FOR VARIOUS TYPES OF CASES AND INJURIES

TYPE OF AWARD	AVERAGE AWARD			MEDIAN AWARD		
	DOLLAR VALUE [$000s]		PERCENT CHANGE	DOLLAR VALUE [$000s]		PERCENT CHANGE
	1975	1984	1975-84	1975	1984	1975-84
MED. MAL	220	666	203%	127	200	57%
PROD. LIAB.	394	1000	153%	121	300	147%
WRONGFUL DEATH	233	668	186%	137	400	191%
CERVICAL STRAIN	5	15	200%	3	8	166%
KNEE	21	114	442%	13	59	353%
VERTEBRA FRACTURE	41	115	180%	25	60	140%
DIRECTOR AND OFFICER	385	583	51%	N/A	N/A	N/A

SOURCES:

All figures are from Jury Verdict Research, Inc. Injury Valuation: Current Awards Trends IV No. 304, except Director and Officer, which is from Wyatt and Company, "Director Insurance Drying Up," New York Times, March 7, 1986. Directors and Officers is for 1974-1984.

AVERAGE VERSUS MEDIAN AWARDS

Changes in median awards are generally much smaller than changes in average awards. There has been a controversy over whether the average or the median award should be used as the yardstick.11/ For a number of reasons medians appear to be preferable in the type of data that has been used to date.

Medians represent the typical award. They show what juries are likely to do -- what they do most often. Averages, which are much higher than medians in this case, indicate that juries occasionally make much larger awards than they typically do.

Under some circumstances averages are a better reflection of the economic burden resulting from jury awards. They give a better measure of the magnitude of awards. That is not the case with civil jury awards, however, because the largest awards are much more likely to be reduced at some later time.

Thus, in this case, averages are misleading as an indicator of typical awards and misleading as an indicator of the ultimate burden falling on the insurance industry as a result of civil law.

It should also be noted that the data almost invariably excludes those cases in which the defendant won. It excludes all of the zeros. Therefore, the data is not a measure of jury behavior, it is a measure of awards, only after juries have found for the plaintiff.

Finally, much of the data used to date has been based on a newspaper clipping service. This approach to data gathering is much more likely to count large awards than small awards. The distortion resulting from the bias in the data will affect the average much more than the median.

We conclude that medians give a more truer picture of how awards have changed because

> averages are misleading as a measure of the economic burden caused by civil liability,
>
> the averages presented are misleading as a measure of the outcome of trials, and
>
> the data underlying most of the averages even overstates actual awards.

This observation on the appropriateness of the medians reinforces our conclusion, based on averages, that juries have not run wild.

VI. OTHER PERSPECTIVES ON ECONOMIC AND SOCIAL CHANGE

The above analysis suggests a slight increase in awards in the period between 1975 and 1984 by making a comparison between a measure of expected lifelong earnings/medical inflation and awards. Another view with different types of data confirms this conclusion.

INSURANCE CLAIMS AND COSTS AS A PERCENT OF GROSS NATIONAL PRODUCT

Table 7 shows the dollar value of insurance paid (including expenses) compared to gross national product. This is a good measure of the economic output of society. Insurance paid grew from $54 billion in 1975 to $137 billion in 1984.

The increase was 153 percent between 1975 and 1984. However, when viewed as a percent of GNP, the increase is much smaller. Insurance paid (including expenses) increased from 3.4 percent of gross national product in 1975 to 3.6 percent in 1984.

Recent increases in claims for the lines of insurance most frequently discussed -- medical and general liability, which includes product liability -- have been somewhat larger, but not very much when compared to GNP.

Similar data is available on health care costs. As Table 8 shows, health care expenditures have increased from 8.6 percent of GNP to 10.6 percent. Payments for health care insurance claims have increased only slightly as a percent of GNP and medical costs, not loss of income, are the cause of the increases in health insurance claims.

TABLE 7

INSURANCE CLAIMS PAID COMPARED TO GROSS NATIONAL PRODUCT (GNP)

YEAR		BILLIONS OF DOLLARS				CLAIMS AS A PERCENT OF GNP			
	GNP	ALL	MED MAL	CMP	GEN LIAB	ALL	MED MAL	CMP	GEN LIAB
1975	1598	54	N/A	N/A	N/A	3.4	N/A	N/A	N/A
1981	3053	103	1.8	7.1	6.8	3.4	.05	.23	.22
1984	3774	137	3.1	11.1	9.7	3.6	.08	.29	.26

SOURCES:

GNP: Council of Economic Advisors, *Annual Report:1986* (Washington, D.C., 1986], Appendix B, Table b-1.

All insurance costs except total for 1975: U. S. Department of Justice, *Report of the Tort Policy Working Groups on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (February, 1986), pp. 17, 2, 21.

All, 1975: U. S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1986* (Washigton, D.C.], Table 870.

TABLE 8

MEDICAL EXPENDITURES AND INSURANCE CLAIMS COMPARED TO GROSS NATIONAL PRODUCT

	BILLIONS OF DOLLARS				AS A PERCENT OF GROSS NATIONAL PRODUCT		
YEAR	GNP	MEDICAL EXPEND.	HEALTH INSURANCE CLAIMS		MEDICAL EXPEND.	HEALTH INSURANCE CLAIMS	
			LOST INCOME	MEDICAL		LOST INCOME	MEDICAL
1975	1598	133	2.7	13.2	8.6	.17	.85
1983	3402	355	4.9	44.3	10.7	.14	1.3
1984	3774	387	N/A	N/A	10.3	N/A	N/A

SOURCES:

GNP: See Table 7.

Medical Expenditures: Levit, K. R., Lazenby, H. Waldo, D. R., Davidoff, L. M., "National Health Expenditures, 1984," Health Care Financing Review, 7:1, Fall, 1985, Table 2.

Insurance Claims: U. S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1986 (Washigton, D.C.], Table 873.

IMPLICIT CONSUMER VALUATION OF LIFE AND HEALTH

A somewhat different perspective is provided, but the same conclusion reached, when we examine how individuals appear to value their own lives and health. As lifelong income increases, we would expect individuals to carry more insurance to protect their increasing worth. As they become wealthier, we would expect them to seek more and better health care.

Table 9 shows the relationship between national average income and average life insurance coverage. Households increased their coverage even more than inflation and real growth.

TABLE 9

LIFE INSURANCE COMPARED TO FAMILY INCOME
(Thousands of Dollars)

YEAR	DISPOSABLE PERSONAL INCOME PER FAMILY	LIFE INSURANCE COVERAGE PER FAMILY	INCOME COVERAGE
1975	14.4	28.1	1.95
1984	27.5	58.1	2.11

SOURCE:

U. S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1986 (Washington, D.C.], Table 868.

In 1975 the average household had $28,100 in coverage and $14,400 in family income. The coverage was 1.95 times income. In 1984, average income was $27,500 and coverage $58,100. Coverage was 2.11 times income. The increase in coverage above the real and inflationary increase in income was about 8 percent. This is consistent with the earlier discussion in which increases in life expectancy and elderly income enhancement indicated increases in lifelong income above inflation and real growth of 7 to 12 percent.

A recent analysis of changes in health expenditures in the period between 1973 and 1983 shows why the growth in health care expenditures has increased as a percentage of GNP. The increase in health care expenditures above the rate of inflation can be divided into three components -- growth in the number of visits [quantity], growth in services per visit [intensity] and real increases in medical prices above inflation [cost].

Table 10 shows that the latter two factors, intensity and cost, which probably apply to medical treatment associated with the types of court cases we have been discussing, are an important part of increasing costs. Increases in medical service quantity and intensity appear to account for approximately three quarters of the real increase in medical expenditures. People are definitely purchasing more health care, in addition to paying more for what they purchase.

TABLE 10

FACTORS ACCOUNTING FOR GROWTH IN EXPEDITURES FOR HEALTH CARE
(Percent)

	COMMUNITY HOSPITAL CARE			DOCTORS' SERVICES	NURSING HOME	TOTAL NATIONAL
FACTOR	INPATIENT DAYS	EXPENSES ADMISS.	OUT-PATIENT			
TOTAL	100	100	100	100	100	100
GENERAL						
INFLATION	50.9	50.9	42.3	55.8	54.7	58.2
POPULATION GROWTH	6.7	6.7	5.6	7.4	7.9	7.7
MEDICAL						
GROWTH IN VISITS	.3	4.4	12.5	-6.1	13.6	N/A
GROWTH IN SERVICES PER VISIT	27.5	23.4	27.5	25.7	15.8	23.5
PRICE INCREASES ABOVE INFLATION	14.6	14.6	12.1	17.2	8.7	1.6

SOURCE:

Arnett, R. H., Cowell, C. S., Davidoff, L. M., Freeland, M. S., "Health Spending Trends in the 198s: Adjusting to Financial Incentives," Health Care Financing Review, 6:3, Spring, 1985, Table 7.

Thus, we find that both the direction and magnitude of social change are consistent with our conclusion that awards have not grown out of proportion to social and economic change.

FOOTNOTES

1. Although not new, the debate over the ability of juries to ajudicate civil liability cases has been intense in recent years. For a sample of opinions see Ashford and Johnson, 1982; Huttner, 1979; Kirst, 1982; Lempert, 1981; Note, 1979; Sperlich, 1982. An official government statement of the issue can be found in Department of Justice, 1986. The popular press has been inundated with stories of the crisis. See, for example, the cover story of *Time*, March 24, 1986.

2. Hunter, 1986a; Localio, 1985.

3. Council of Economic Advisors (hereafter, CEA), 1986, Table B-55.

4. CEA, 1986, Table B-43.

5. Bureau of the Census, 1986, Table 16.

6. Daniels, 1985; Court Statistics and Information Project, 1986.

7. Bureau of the Census, 1986, Tables 5 and 664.

8. Here one must also keep in mind that there is a lag in the adjustment process. The recognition of greater risk should elicit social responses to reduce risks. Between the recognition of risks and the response that reduces risk there is likely to be a period of heightened legal and court activity.

9. CEA, 1986, Table3 B-24.

10. Insurance Service Office, 1977, Table 5-6.

11. Hunter, 1986a; Localio, 1985.

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Mr. HERMAN. Mr. Shapo, I realize that you are going to have to depart for another engagement, but we will have some questions that we will be submitting in writing.

Mr. SHAPO. Surely.

Mr. HERMAN. Thank you.

Mr. Ernie DuBester, with the AFL-CIO.

STATEMENT OF ERNEST DuBESTER

Mr. DUBESTER. Thank you. The AFL-CIO appreciates this opportunity to express its opposition to S. 2760. The subject of product liability is of profound importance to the millions of working men and women and therefore to the labor movement itself.

Every day, thousands of workers are injured and killed in the workplace as a result of defects in the machinery and equipment with which they work, and every day thousands of workers inhale, ingest, or absorb toxic chemicals that permeate the air in which they work, often resulting in occupational diseases.

Because State workers compensation laws often provide inadequate relief for those suffering traumatic injuries and little or no relief to those suffering illnesses associated with exposure to toxic substances, and moreover because the Occupational Safety and Health Administration has often defaulted on its duty to protect worker safety and health, especially during the past 6 years, many workers have found that their only recourse for full redress for their injuries is product liability litigation.

Indeed, studies indicate that up to half of the money paid for product liability claims goes to workers who have been injured on the job, so accordingly, any change in product liability law that would impair the ability of injured persons to be made whole for the losses they suffer would strike a severe blow at the American worker.

At the same time, we recognize that millions of workers are employed by product manufacturers, and all workers, of course, are consumers of goods made by such manufacturers. And given the current legal situation, most product manufacturers have concluded that to stay in business they must be able to obtain adequate levels of liability insurance at affordable prices.

Recently, as we are all aware, the insurance industry has ceased offering adequate levels of product liability insurance at any price, often setting the cost of such insurance at prohibitively high prices.

These developments in the product liability area parallel developments in the area of liability insurance generally. No sector of the economy has been spared the effects of the insurance industry's actions. Unfortunately, the American worker and consumer have been the ultimate victims of these developments.

In May of this year, the executive council of the AFL-CIO issued a statement on liability insurance and tort law which called for comprehensive and balanced reforms of a multifacet nature designed to accommodate legitimate, yet often conflicting interests of providers and of injured persons.

Unfortunately, the bill reported by the Senate Commerce Committee, S. 2760, is not such a measure. Rather, it is the sort of one-sided approach which the AFL-CIO executive council statement correctly warns will only exacerbate, rather than alleviate the present problem. This is especially true with the so-called expedited settlement system contained in title II of the bill, although it is also true with respect to the tort law reforms contained in title II.

The statement which we have submitted, which I would request be inserted in the record in full, essentially focuses its comments on title II of the system, but just briefly if I could comment on that:

Title II, of course, is designed to establish a scheme for expedited settlement of product liability claims and it seeks to accomplish this objective by establishing penalties for those who reject the settlement offer if the offer meets their own specifications.

Regrettably again, it is the one-sided nature of these penalties and of the elements of a settlement offer that make the bill so unbalanced and unfair. The essential thrust of the bill is to reduce the exposure to liability of product manufacturers and sellers, while reducing the ability of the injured workers and consumers to be fairly compensated for the injuries they have received.

Almost invariably, a title II settlement offer will represent a small fraction of the manufacturer's actual exposure. The only plaintiffs therefore who are likely to have any interest in inducing a manufacturer to settle under title II are plaintiffs who will be the least likely to recover in court because of some serious weakness in their case, in other words the least deserving plaintiffs.

In contrast, manufacturers are often likely to desire to coerce a plaintiff to accept a settlement under title II, especially in those cases in which the manufacturer's misdeeds have inflicted grave harm and in which the manufacturer's potential liability is especially high.

The one-sidedness of the penalties that are imposed under title II for refusing a settlement offer are also very significant. For the plaintiff, the penalties for plaintiffs who reject such an offer are severe, almost extreme. Such a plaintiff forfeits his or her claim for compensation for any economic loss for which the plaintiff received reimbursement from any other source, such as from insurance, the plaintiff purchase, or for government social welfare programs.

Additionally, plaintiffs who reject title II settlement offers also forfeit claims for any noneconomic or general damages exceeding $50,000 except in those most serious cases where they could receive up to $250,000. In contrast, the penalties imposed on manufacturers who reject title II settlement offers are modest indeed. Whereas, a plaintiff who rejects a proper offer is penalized even if the plaintiff is fully vindicated in the ensuing litigation, manufacturers who refuse an offer will suffer sanctions only if the manufacturer eventually is required to pay to the plaintiff damages that exceed more than the settlement offer, and even in those cases the sanctions are weak.

In short, few victims of defective products are likely to want to submit to title II settlement offers because of the rigid limits on what can be included in such offers, and few manufacturers who receive such offers are likely to feel constrained to accept the offer because of the weak sanctions placed upon manufacturers who refuse.

I would just quickly add one further fundamental respect in which the settlement system, which forms the heart of the Commerce Committee bill, is one-sided, and that is because it only deals with one aspect of the multifaceted problems currently confronting the product liability system.

The committee bill does nothing of substance to address the responsibility of the insurance industry for those problems. As we noted earlier in the statement, the insurers bear a large measure of blame for what is happening to the costs of liability insurance, and we believe that the Federal Government has an active role to play in monitoring the insurance industry and in developing a set of basic regulatory requirements for State regulators to follow with respect to the industry.

For all of these reasons, we would urge the committee to do all to prevent S. 2760 from being enacted.

Thank you.

[The prepared statement of Mr. DuBester follows:]

86-28

TESTIMONY OF ERNEST DUBESTER, LEGISLATIVE REPRESENTATIVE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS BEFORE THE SENATE JUDICIARY COMMITTEE ON S. 2760, THE PRODUCT LIABILITY REFORM ACT

September 10, 1986

Mr. Chairman, the AFL-CIO appreciates this opportunity to state its opposition to S. 2760, the so-called "Product Liability Reform Act" that the Senate Commerce Committee has reported.

The subject of product liability is of profound importance to working men and women and therefore to the labor movement. Every day, thousands of workers are injured and killed in the workplace as a result of defects in the products -- principally the machinery and equipment -- with which they work. And every day thousands of workers inhale, ingest, or absorb toxic chemicals that permeate the air in which they work, resulting in occupational diseases.

In theory, the workers' compensation system exists to provide fair recompense to such workers and their families, and the Occupational Safety and Health Act exists to assure each worker "safe and healthful working conditions." But in practice, state workers' compensation laws provide inadequate relief to those suffering traumatic injuries and little or no relief to those suffering illnesses associated with exposures to toxic substances. And in practice, the Occupational Safety and Health Administration has defaulted on its duty to protect workers' safety and health, especially during the past six years.

Because of these developments, many workers have found their only recourse for full redress for their injuries to be product liability litigation. Indeed, studies indicate that up to half of the money paid for product liability claims goes to workers who have been injured on the job. Accordingly, any change in product liability law that would impair the ability of injured persons to be made whole for the losses they suffer would strike a severe blow at the American worker.

At the same time, millions of workers are employed by product manufacturers, and all workers are consumers of goods made by such manufacturers. Given current legal realities, most product manufacturers have concluded that to stay in business they must be able to obtain adequate levels of liability insurance at affordable prices. Recently, the insurance industry has ceased offering adequate levels of product liability insurance at any price, or has set the cost of such insurance at prohibitively high prices.

These developments in the product liability area parallel developments in the area of liability insurance generally. No sector of the economy has been spared the effects of the insurance industry's actions. The American worker and consumer have been the ultimate victims of these developments.

In May of this year, the Executive Council of the AFL-CIO issued a Statement on Liability Insurance and Tort Law which sets forth in detail our position on these critical subjects. That Statement recognizes that the causes of the current situation with respect to liability insurance are "multiple and complex" and that, while "the insurance industry 'must accept the major responsibility," the "tort system has contributed to the cost of insurance" as well. The Statement therefore called for "comprehensive and balanced reforms" of a "multi-faceted" nature designed to "accommodate the legitimate yet conflicting interests of providers and of injured persons."

The bill reported by the Senate Commerce Committee S.2760 is not such a measure. It is, rather, the sort of "one-sided approach" which the AFL-CIO Executive Council's Statement rightly warns "will only exacerbate, rather than alleviate, the present problem." That is especially true with respect to the so-called "expedited settlement system" contained in Title II of the bill, although it is also true with respect to the tort-law reforms contained in Title III. Because the settlement system forms the heart of the Commerce Committee's bill, we wish to focus our comments on that system.

The Commerce Committee's report accompanying S. 2760 states that "Title II of the bill establishes a scheme for expedited settlement of product liability claims . . . based on incentives for settlement that will reduce the delays, excessive transaction costs, and uncertainties associated with such claims."_/ In truth, however, Title II does not add anything to the benefits that, in the nature of things, the parties to litigation inherently derive from reaching a mutually-satisfactory resolution of a case. What Title II does instead to "encourage" settlements is to establish penalties for those who reject a settlement offer if the offer meets certain specifications. And it is the one-

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_/S. Rep. 99-422, 99th Cong., 2d Session at 31.

sided nature of these penalties and these specifications that make the bill so imbalanced and unfair.

The requisites for a settlement offer whose rejection will trigger Title II's sanctions are set forth in section 201 of the Commerce Committee's bill. That section states that an injured person may only demand by way of settlement -- and all that a manufacturer need offer -- is payment for net economic loss and, in the most serious cases of intangible injury, payment of $100,000 in general damages. In contrast, under present law, a wrongdoer manufacturer is not the payor of last resort for economic injury but is liable for the full amount of such injury the manufacturer causes, without regard to whether the injured individual has some other source of payment. Moreover, in most jurisdictions, the manufacturer is also liable for the full amount of the intangible or non-economic injury the manufacturer inflicts, without any arbitrary cap.

What this means, then, as the minority views to the Commerce Committee's report demonstrate, is that almost invariably, a Title II settlement offer will represent a small fraction of the manufacturer's actual exposure. Thus, the only plaintiffs who are likely to have any interest in inducing a manufacturer to settle on Title II's terms are plaintiffs who would be the least likely to recover in court because of some serious flaw in the plaintiff's claim of liability. These are the least deserving plaintiffs. In contrast, manufacturers are often likely to desire to coerce a plaintiff to accept a Title II settlement, especially in cases in which the manufacturer's misdeeds have inflicted grave harm and in which the manufacturer's potential liability is especially high.

It is at this point that the one-sidedness of the sanctions for refusing a Title II settlement offer, as set forth in sections 203 and 204 of the Committee's bill, becomes so significant. The penalties for a plaintiff who rejects such an offer are severe in the extreme. Such a plaintiff forfeits his claim for compensation for any economic loss for which the plaintiff received reimbursement from another source, such as from insurance the plaintiff purchased, or from a government social welfare program. In addition, a plaintiff who rejects a Title II settlement also forfeits his claim for any non-economic or general damages in excess of $50,000 in all but the most serious of cases, and in excess of $250,000 in such cases.

In other words, in most cases, the maximum amount of compensatory damages that a plaintiff who refuses a Title II settlement offer will be able to recover will be $50,000 more than the offer; in cases of especially grave, noneconomic injury -- such as cases involving the death of a parent or child, or the loss of a bodily function like sight, sound, or motion -- the maximum compensatory recovery will be $150,000 more than the settlement offer. Given how relatively little can be won by a plaintiff who rejects a Title II offer and then prevails in court, the offer will truly be one that most plaintiffs cannot refuse.

In contrast, the penalties imposed upon manufacturers who reject Title II settlement offers from plaintiffs are modest, indeed. Whereas a plaintiff who rejects a proper offer is penalized even if the plaintiff is fully vindicated in the ensuing litigation, a manufacturer who refuses an offer will suffer a sanction only if the manufacturer eventually is required to pay to the plaintiff damages that exceed more than the settlement offer. Moreover, even in that case, the sanctions are weak.

In earlier drafts of S. 2760 that were circulated during the Commerce Committee's deliberations, the Commerce Committee considered requiring manufacturers who insist on litigating and who are found liable to pay the plaintiff's attorneys fees, interest at a high rate (2% per month) on the judgment awarded, and also to pay liquidated damages up to double the judgment. The Committee also considered relaxing the substantive rules of law for imposing liability on manufacturers who force litigation. However, in the bill the Commerce Committee has reported, the only sanction that remains on the nonsettling manufacturer is payment of fees to the plaintiff's attorney, calculated on an hourly fee basis without regard to the risk the attorney assumed, in taking the case, that the attorney would receive no compensation. And even this sanction is diluted by placing a $100,000 ceiling on the manufacturer's liability and by mandating a reduction in liability for fees if the manufacturer "had a reasonable basis for rejecting the offer of settlement." In sum, the most that a manufacturer can be penalized for rejecting a Title II settlement offer is $100,000 -- a relatively small amount for most manufacturers -- and it is extremely unlikely that the penalty will ever reach even that level.

The short of the matter is simply this. Few victims of defective products are likely to want to submit Title II settlement offers because of the rigid limits on what can be included in such offers, and few manufacturers who receive such offers are likely to feel constrained to accept the offer because of the weak sanctions placed upon manufacturers who refuse. Many wrongdoing manufacturers, however, are likely to make Title II offers in order to obtain a cheap settlement -- especially where the manufacturer has caused grievous injury -- and most victims who receive such an offer are likely to be bludgeoned into submission because the stiff sanctions for litigating all but eliminate any possible gain from continuing to litigate. We submit, therefore, that by any definition, this is a one-sided and imbalanced settlement system.

There is one further, and perhaps even more fundamental respect, in which the settlement system which forms the heart of the Commerce Committee's bill is one-sided: it treats with only one aspect of the multi-faceted problems currently confronting the product liability system. The Committee's bill does nothing of substance to address the responsibility of the insurance industry for those problems. Yet as we noted, the insurers bear a large measure of blame for what has been happening to the cost and availability of liability insurance. And we believe that the federal government has an active role to play in monitoring the insurance industry and in developing a set of basic regulatory requirements for state regulators to follow with respect to the industry.

In this regard, the Commerce Committee's bill should be contrasted with laws recently enacted by the Florida and New York legislatures. Those bodies have enacted statutes -- each quite different from the other -- which make substantial modifications in the tort law. Those laws, however, couple these tort-law amendments with effective regulation of the insurance industry, including mandatory premium reductions, ceilings on rate increases, and protections against arbitrary cancellations of insurance. Although we by no means agree with all of the tort modifications made by these laws, the labor movement in those states nonetheless joined in supporting the enactment of these balanced measures.

Our point in noting the Florida and New York laws is not that federal legislation in this area is necessarily inappropriate; we repeatedly have made clear that we hold the opposite view. But at a time when the states are beginning to find ways of developing balanced measures that address all of the relevant interests and considerations, it would be most tragic if the federal government were to lead in the opposite direction by enacting a regressive and one-sided law like S. 2760.

For these reasons, the AFL-CIO opposes passage of the Commerce Committee's bill and we urge this Committee to do all within its power to prevent that bill from being enacted.

Mr. HERMAN. Thank you very much. I ought to note that your entire statement will be included in the record.

In the interest of time, I have a number of general questions that I might throw out to the panel as a whole. Additional questions will be addressed to you in writing for your individual responses.

There seems to be unanimity in this panel that the expedited settlement process would not work as intended. Earlier today, we had testimony from Mr. Scott discussing a mandatory mediation process that has been in operation in Wayne County and Detroit, MI. Would any of you like to comment on the appropriateness of that type of process?

Mr. GOFFMAN. We have only just heard about this process from Mr. Scott's testimony, but speaking personally I think that it is a very intriguing idea and ought to be explored because it seems from his description that it focuses on just what we are most concerned with, speeding adequate compensation to injured victims.

Obviously, the penalties or sanctions involved are keyed to determining whether or not it on the one hand would be effective and, on the other hand, would be fair and that is something we would have to look at more closely. But what is noteworthy about his description is it does not seem to preclude or reduce victims' rights in the court system.

Mr. HERMAN. To the extent that sanctions would be placed upon parties that did not abide by the mediator's recommendations because they acted arbitrarily, in bad faith, or that the final settlement was virtually identical to the recommended mediation findings, are sanctions appropriate in those cases? Does that curtail the rights of the plaintiffs or defendants?

Mr. KIMMELMAN. I think our feeling in general is that there may be ways of putting appropriate incentives on plaintiffs without sanctions. One key element that was not raised in the Michigan example was the timing element. There is some indication that claims are resolved more quickly there, but still not very quickly. They are still talking about a 3- to 4-year time period.

One of our chief goals is trying to make sure that these disputes are resolved more quickly and in a cheaper fashion for the system itself. So I think from our perspective there is already ample incentive for plaintiffs to settle. I believe the statistics for Michigan showed that most cases are settled there under this system, but not really more than under the tort systems of other States. I think we would be looking for the kind of sanctions that would get money to people more quickly without impeding their rights to go ahead and litigate the claim if they thought that they had not been treated fairly.

Mr. HERMAN. Any other comments on that?

Ms. LIPSEN. I just have one comment. Under some of the settlement systems that have been proposed to the Senate Commerce Committee before the imposition of caps, there was a recognition that manufacturers were indeed getting something out of a settlement system. They were getting the benefit of a trial without jury. They are getting the benefit of the collateral source rule and other procedures that were very beneficial to them. Also they were getting the benefit of not having to pay 10 years in legal fees. So I think that it works really for both sides. It is just a matter of perception as to what both sides are getting out of it.

Mr. **Herman**. Thank you.

Mr. Kimmelman, if I might direct a specific question to you: In the past, CFA has organized conferences on this issue that have endeavored to bring the various parties closer together. Is that process continuing and has there been any success in that effort?

Mr. **Kimmelman**. Yes, that process is continuing. We have, I think, six conferences this year and we have been discussing the possibility of doing one on product liability next year. Unfortunately, our staff cannot handle more than that number in 1 year and we have a number of other issues that have been very active, but we have been considering putting it back on the list because we think it is extremely important to try to resolve the issue.

Mr. **Herman**. The topic of joint and several liability has been a sensitive one in this proceeding, and I would like to raise the question of whether it could equitably be modified in some fashion. Joint and several liability is a vestage of what is generally deemed to be a distributive form of justice in this society, allowing the insurance mechanism or the marketing of goods and services to pay for the costs of compensating victims. How much is enough? How much is too much? How much can consumers bear to allow these costs to be placed upon them through this mechanism? At what point is there an injustice to consumers? Does anybody want to pick that up?

Mr. **Kimmelman**. Well, I think that what we believe is fair are some of the comparative fault notions that have been discussed in legislation where it is quite reasonable to assume that any plaintiff who is responsible for part of the harm should actually bear that risk.

What we are opposed to in the joint and several areas is shifting the burden of proof and burden of going out and finding additional parties when one defendant or a number of defendants have already been found to be at fault for the harm. So if it is the question of how much is enough, we cannot answer directly that way. It is really the question of what is the fair burden on each party to the suit.

We have nothing against requiring the plaintiff to own up to his or her own fault for the injury that occurred. Our difficulty is in who must prove what, once you already have one defendant adjudicated a wrongdoer by the court.

Mr. **Herman**. So you have no difficulty in a situation in which a number of parties that are preponderantly responsible for harm, that are judgment proof, not having their proportion of liability and responsibility and cost passed along to other parties as long as the standards that they had to adhere to are reasonable?

Mr. **Goffman**. I think the key for us even in that situation is insuring that whatever solution is reached does not result in the victim being deprived of full compensation for the injuries that were proved. As long as that party that ends up paying the cost was in fact demonstrated to be a true wrongdoer, there is no unfairness there.

The key I think would be to examine some way, either providing alternative compensation or correcting imbalances among wrongdoers, but not without taxing the victim—rather not by taxing the victim with undercompensation.

Mr. DuBester. I agree with that statement. I would expand it briefly just to point out that in terms of our concern that any solution that is worked out in this area does not deprive victims of their entitlement to be compensated fairly and fully. The problem associated with occupational diseases, of course, even produces a more difficult burden upon victims in terms of establishing causation, and to that extent I think it would be something that this committee should be very sensitive to in terms of establishing any modification that would make that burden in that particular area more difficult to find injured victims.

Mr. Herman. Mr. DuBester, you included in your statement an outline of the AFL-CIO's policy position in this area attributing the current crisis to multiple causes. Has the AFL-CIO developed any proposals or models as to how these issues ought to be addressed?

Mr. DuBester. We do not have any proposals or models per se. We have general guidelines obviously in terms of what we consider the essential prerequisites to any consideration of the problems associated with this area. But again, as we pointed out, what we are concerned with is multifaceted proposals.

We cite, for example, a couple of actions that have been taken by State legislatures which we note only for the purpose of pointing out that they are more comprehensive-types of approaches, not that we agreed with all the remedies that were effectuated there with regard to the modification of the tort law, but they were coupled with some meaningful reforms in the insurance industry area and to that extent we looked to those kinds of comprehensive approaches.

Again, also we are very concerned in terms of addressing any kind of modification at all with regard to the product liability law area that we have sufficient provisions that address the very serious problems associated again to the matter I just raised, which is toxic chemicals producing occupational diseases. So those are some of the general considerations we have, but we do not have specific proposals per se in terms of model law.

Mr. Herman. Thank you very much.

I think we are ready to proceed to our last panel. The first spokesman on this panel is David Owen of the University of South Carolina.

PANEL CONSISTING OF DAVID G. OWEN, UNIVERSITY OF SOUTH CAROLINA; VICTOR E. SCHWARTZ, CROWELL & MORING; AND SOL SCHREIBER, MILLBERG, WEISS, BERSHAD, SPECTHRIE & LERACH

Mr. Owen. Thank you, Mr. Counsel.

My name is David Owen and I am a law professor at the University of South Carolina, where I teach and have taught courses in product liability and tort law for some time. I am pleased to appear before you today to present a petition to the Congress, on behalf of myself and nearly 200 law professors and law school deans from around the country, all professors of product liability or tort law, advocating that S. 2760 or any other general product liability bill include a provision setting forth uniform standards of manufacturer liability.

We believe that the central problem—by no means the only problem but the central problem—of product liability law today involves the uncertainty in definition of the basis of manufacturer responsibility; the nature and test of liability for manufacturers.

Federal intervention in product liability law is said to be appropriate to promote clarity, uniformity, fairness, and predictability in the law. Much of the confusion, uncertainty, unfairness in the present law derives from the fact that most States have a variety of definitions from tort law and contract law, from common law and statute law, on the standard of manufacturer liability. Moreover, these standards change even within the same State from year to year as new judges and new crops of law clerks prove themselves unable to resist the urge to try their hands at unraveling anew the mysteries of product liability doctrine. The problem with all of this, of course, is that manufacturers selling nationally cannot, as a result of these disparate standards, comprehend their legal responsibilities in any meaningful way, nor can their insurers, nor can the plaintiff's bar, nor can the public, nor even the trial or appellate courts.

The very first thing, therefore, that any Federal law in this area must do is to establish a uniform standard of manufacturer liability. While agreement on just what such a standard should provide may be politically difficult, the absence of such a standard from any product liability law is in our judgment a fatal flaw. A Federal law so drafted might be likened to a Federal criminal code that contained no standard for criminal intent. In each case, the absence of a central provision defining the prohibited misconduct would leave the law an empty shell, a miscellany of secondary provisions surrounding an empty core. Accordingly, we academic lawyers take the position that any principled Federal bill purporting to address broadly the law of product liability must include a standard, reasonable of course, of manufacturer liability.

We think that the particular standard proposed in the petition is both reasonable in itself and a fair compromise between the competing extremes. First, it provides for both fault and no-fault manufacturer responsibility, similar to the law in all States today. Second, it defines liberally the no-fault basis of liability, truly removing the question of fault from the liability determination. Third, and finally, responsibility on a no-fault basis is strictly limited to a claimant's true economic loss.

We believe that this combined approach defining liability broadly but restricting damages provides the most promise for a fair and sensible uniform basis of liability for manufacturers, and that a standard along these lines should be included in S. 2760 or other similar Federal product liability legislation.

Thank you, Mr. Counsel, and staff of the committee. I hereby present to you the endorsed petition and request that the petition with its endorsements be included in the record.

[The petition referred to follows:]

--PETITION TO THE CONGRESS--

We, the undersigned torts and products liability law professors, recommend to the Congress that a provision like the following, governing Standards of Manufacturer Liability, be included in any products liability legislation it may enact. This petition does not endorse or oppose the concept of a federal products liability act, nor any particular bill, but only recommends the inclusion of such a provision if such a law be enacted.

* * *

UNIFORM STANDARDS OF MANUFACTURER LIABILITY

A. A manufacturer may be liable for harm caused by a product only if the claimant proves by a preponderance of the evidence that:

(1) the product was unreasonably dangerous, because the aspect of the product that caused the claimant's harm was: (a) more dangerous than was reasonably to be expected, or (b) caused more harm than benefit; or

(2) the manufacturer was negligent in the manufacture or design of the product or in the provision or failure to provide information concerning product dangers or methods of safe use.

B. A prevailing claimant's damages under subsection A(1) are limited to economic losses, including reasonable litigation expenses.

* * *

ENDORSEMENTS ATTACHED
HERETO AS PAGES TWO
THROUGH TEN

DATED: September 10, 1986

Attest: David G. Owen
David G. Owen

Sworn and Subscribed
before me this 10th
day of September, 1986.

Laura F. Long
Notary Public

Page Two
September 10, 1986

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Mr. **Herman**. Thank you very much.

Mr. Schwartz.

STATEMENT OF VICTOR E. SCHWARTZ

Mr. **Schwartz**. Mr. Counsel, Mr. Herman, Mr. Dunn, other members of the Judiciary Committee staff, I thank you for the invitation to be here today. First, we ought to realize that we have witnessed a miracle; 100 law professors have agreed that there should be a fault standard and a written standard of liability in a Federal bill. Mr. Owen has achieved a minor miracle and I think careful attention should be given to his petition and what is contained therein.

I really begin with a brief recap of the effort by the Federal Government to look at product liability it began 10 years ago. There is a French phrase that says, "The more things change, the more things remain the same."

I chaired the Federal Interagency Task Force on Product Liability which began its work in 1976, our task force, in 1978, found that overly subjective insurance pricing and unpredictable and uncertain tort law were the basic causes of the product liability problem. We try to use commonsense approaches to address it.

We addressed the problem of overly subjective product liability insurance pricing through the Federal Product Liability Risk Retention Act. Today, in the United States of America, anyone who feels that the insurance mechanism for product liability is unfair can form its own self-insurance group. Not that many have formed, and one reason why is because the other aspect of the problem, the uncertainties in the tort system, has never been addressed.

How can you have a rational insurance mechanism when the rules of law are in constant flux? In the past year, one court held that absolutely innocent manufacturers would have to pay full tort damages. They could not even show that they neither knew or could have known of the risk.

Another State supreme court held that a manufacturer of a gun was liable because the gun worked. There was nothing shown to be wrong with it. The court simply felt that the risks posed by handguns outweighed their utility.

Another court held that someone who had no injuries but merely was worrying about the future could receive a substantial award. And recently the Supreme Court of Oklahoma ruled that a woman could receive a substantial judgment in tort law because she found a piece of Good-N-Plenty candy in a soda bottle.

Claims data does not help very much when the courts can change the rules of the game after the die is set. We think that we have to stabilize the rules of law in some rational and reasonable way and also address the excessive legal costs that permeate our system.

The legal costs are addressed in S. 2760 by a provision that puts penalties on counsel, both plaintiff and defendant, if they bring frivolous claims or unduly delay the legal process. This is a provision that should deserve the support of all groups who come to this table on product liability reform.

With regard to addressing the uncertainties in tort law there has been some suggestion that this is a matter that should be left to the States. We attempted to go to the States with the Uniform Product Liability Act, but going to the States for statutory tort reform simply did not work. The States did not act the way they did with the uniform commercial code. The rules of tort law that they adopted were as diverse as the States themselves.

Federal legislation is the only way that you are going to get uniformity and predictability in tort law in the product liability area.

We have heard a lot that somehow any effort in this area is against consumers, but I think that that is really a myth. Many things in the so-called Danforth bill help consumers. There is a statute of limitations that expands the rights of people in many, many States. And simply because a provision limits somebody's right to sue does not automatically mean that a matter is anticonsumer.

Consumers are paying 19 percent every time they buy a lawnmower for product liability, 20 percent with the ladder, up to 50 percent with general aviation. That is because the law in some of our States lets people recover when they misuse products in an unreasonable way, when there are unforeseeable alterations of products. I cannot understand how ordinary consumers would want to pay more for goods to pay people who have made misuses of products.

We have made some suggestions about the Senate Commerce Committee bill, but fundamentally there are just a few changes that I think are very important. One, with the expedited claim system we have to have a system that is not open-ended. If we settle a claim, the payment should be clear once and for all, not with a damage component that is open into the future.

Second, I would agree with what Professor Owen says, that without a fault-based liability or a standard of liability in the bill that tells manufacturers when they are liable, you have a pretty hollow piece of legislation.

The Kasten-Lugar-Kassebaum amendment will at least say that people who neither know nor could know about a harm should not be liable, in other words an out of perimeter liability is helpful. But more helpful would be a standard, however it is written, that tells manufacturers this is when you are going to be subject to liability, here is a standard you can live up to, here is a standard that is fair. That will help promote product safety and put balance in the system.

Until this is done, until there are rules people can live by, we are going to continue to have product liability crises. This one is greater than the last one. The next one will be greater than this one, and that is an area that the Judiciary Committee, with its expertise, can act and that is to provide a core for this bill, a standard of liability that is reasonable.

I thank you for your time this afternoon.

[The prepared statement of Mr. Schwartz follows:]

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TESTIMONY BY
VICTOR E. SCHWARTZ, ESQUIRE
PARTNER
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WASHINGTON, D.C.

Introduction.

Mr. Chairman, thank you for your kind invitation to testify today before the Senate Judiciary Committee. I am very pleased that the Judiciary Committee has decided to use its very valuable time in considering the product liability issue. This Committee is the lawyer's Committee, and I appreciate the fact that you will be sensitive to both the practical and legal nuances of this complex issue. The Federal government's exploration of the product liability problem began in the spring of 1976 when I had the privilege of being asked to chair the Federal Interagency Task Force on Product Liability under President Ford. I was asked to do this because I had authored the leading torts casebook in the United States, Prosser, Wade and Schwartz, Cases and Materials on Torts, chaired the American Bar Association's Committee on products liability and authored close to 100 articles in the fields of torts and insurance law. The Task Force study was continued under the Carter Administration, and it found two basic causes of the product liability crisis that occurred in the 1976 - 1978 period -- uncertainties and unpredictability in the tort law and overly subjective insurance pricing.

There is a French phrase that translates the more things change the more they remain the same. This is indeed applicable to the current product liability crisis. The basic causes have not changed much. We have, indeed, addressed the insurance aspect of the problem in the product liability area when the Congress in 1981 passed the Federal product liability Risk Retention Act. This Act in plain common sense terms says that if a small business or businesses believe that the insurance pricing mechanism is unfair, they can easily set up their own self insurance groups.

Some have done so, but most have not. Why is this so? The common sense answer is that nothing has been done about the other principal cause of the crisis, the same cause that existed when the Task Force issued its Final Report in 1978 -- the uncertainties and unpredictability in our tort law.

I stress that this is plain common sense -- one does not really need a study to prove it. How can one have a rational insurance pricing mechanism if the rules about when one pays are in constant change and ferment. In the past year for example, the Supreme Court of Louisiana broke all precedent and held that totally innocent manufacturers would have to pay full tort damages.[1] The highest court of Maryland held that a gun manufacturer would have to pay damages when someone was hurt even though the gun performed exactly as was intended.[2] Curiously, a court in California held exactly the opposite.[3] A Federal court in Mississippi held that someone could recover money simply because he worried about suffering an illness he might get in the future.[4] And recently, the Supreme Court of Oklahoma decided that a woman could recover a substantial tort judgment because she noticed a piece of "Good-n-Plenty" candy in a soda bottle.[5] Again, she merely noticed the piece of candy, it never touched her lips, it did not make her sick, although I think the tort system may have that affect on many of us!

A number of witnesses today have pointed to the "absence of claims data" as a reason to take "no action" to reform the tort system. But what good is claims data in an area where the future has relatively little to do with the past? Product liability tort law is not like life insurance or accident insurance where the past tells us a lot about what will happen in the future. We are in an ever changing and uncharted sea, and that is why the Federal product liability Risk Retention Act has not had a whole lot of takers. The uncertainties are the same for all self insured and commercially insured alike.

Excessive Legal Costs.

The uncertainties in the tort law have helped generate tremendous and unnecessary legal costs in product liability. Data clearly show that victims are getting less money than the lawyers.

But uncertainties in the tort law are not the only factor that contributes to unnecessary legal costs. There are unreasonable and unneeded delays by some defense attorneys. There are frivolous and unwarranted claims brought by plaintiffs' attorneys. Fortunately, this cause has been specifically addressed in the Senate Commerce Committee bill, S. 2760, with a provision that applies strict sanctions against counsel who bring frivolous claims or engage in unncessary delay. While this is a good start, the frivolous claims provision is unlikely to work if there are no rules or guidelines concerning when a manufacturer is to be held liable.

From Common Law to Legislation to Federal Legislation -- Back to Basics.

Sometimes it is useful to go back to basics. For those of us who have followed the issue for the past ten years, we can sometimes miss the forest for the trees. We forget that 99% of product liability law today is formed by courts on a day-to-day basis. Unfortunately, the courts have gone a myriad of ways in formulating product liability rules. Their decisions are as diverse as the personalities of the people who occupy the bench. With 51 sets of ever changing rules and thousands of courts, it is no wonder that the law is simply a mess. While the common law worked well for many years in our country, it does not do so in product liability law anymore. It worked well when there was a "common morality" and decisions tended to move slowly and adhere to the past. This does not occur today. Today, there are very different views among judges about what the tort system should accomplish. Today, there is a strong economic dependency in our insurance system on having some stability in those rules. This dependency did not exist at common law. Today, it is crystal clear that product liability law can no longer be left to the vagaries of the common law -- it must be put in a legislative framework.

Need For Federal Action.

When I served as Chairman of the Product Liability Task Force, we drafted the Uniform Product Liability Act. It was to serve as a model for state legislation. In spite of this model and efforts to have states act in a harmonious way, what was produced was even more differences, as each state enacted its own version of a product liability law. Unlike the experience with the Uniform Commercial Code, there has been no harmony in state legislation. Moreover, states are frustrated in this area because products are shipped out of the states of their origin -- over 70% on average of products end up in other states. State legislation cannot affect the overwhelming majority of cases that are brought against their home-based industries. It is beyond a shadow of a doubt that product liability has become interstate commerce. In fact, in August of this year the National Governors Association voted to reverse its former position in opposition to Federal product liability legislation. We need legislation, and that legislation must be Federal.

The Anti-Consumer Myth.

It has been asserted that some very early versions of Federal legislation, in effect, "tilted the law" toward defendants. That "tilt" has long since passed. S. 2760 in a number of ways, expands liability of manufacturers. One example is the statute of limitations which begins at a time a person knows or should have known about a harm and its cause, as contrasted with the law of some states where a claim arises as soon as a person is injured.

More importantly, rules that limit recovery are not automatically "anti-consumer." If there are excessive costs in the system, they hurt consumers by raising the price of products. Today, product liability accounts for over 20% of a price of a ladder, over 19% of the price of a lawnmower and close to 50% of the price of general aviation equipment. At the many hearings on product liability we always see business groups on one side of the room and the professional consumer groups on the other, but that picture is not a true reflection of businesses and consumers in the United States of America -- we all have an interest in removing excessive costs from the tort system. A Lou Harris Poll shows that 69% of consumers believe the tort system has gone too far. Consumers do not wish to pay inflated prices for products because some people misuse products, or drive while they are intoxicated, or do not follow instructions, or alter equipment and then are hurt. It is surprising that professional consumer groups have opposed reforms that would eliminate liability of manufacturers when there has been an unreasonable or unforeseeable misuse of a product. That rule is included in the Kasten-Lugar-Kassebaum Amendment to S. 2760, and it should be supported by this Committee.

On another point, most ordinary consumers think it is ridiculous that the tort system should pay people who have already been paid by health or accident insurance. That is why Senator McConnell's idea to reform the collateral source rule is sound and deserves support.

Finally, the Lou Harris Poll suggests that most consumers think there should be some limit on liability at least with respect to non-economic costs. While the limit is arbitrary no matter what level is set, ($300,000, $500,000, $1,000,000), it is even more arbitrary to leave non-economic damages -- damages that have no market value -- totally open-ended.

In sum, the idea that any tort reform legislation is automatically anti-consumer is a myth. The Judiciary Committee can help educate members of both the House and Senate by making that a finding of this Committee. The time for providing large awards to people who hit the tort jackpot because they find "Good-n-Plenty" candy in soda bottles should be over!

S. 2760 -- The Senate Commerce Committee Bill.

S. 2760 contains many sound provisions and it has worthwhile goals. A principal goal is to eliminate the excessive legal costs. Unfortunately, its mechanism for reducing legal costs has one significant flaw. This Committee can assist the process by proposing amendments that would help eliminate that flaw. The flaw arises out of the fact that the settlement system is open-ended. When a defendant comes forward with an offer to settle, there is no finality as to the amount of that offer. It is, in effect, an offer to pay net economic loss "forever." There has to be continued determinations and redeterminations of the amount of that loss. This creates unsettlement for both sides of the equation. We will submit language to this Committee suggesting an amendment that will correct this problem.

S. 2760 can also be strengthened by adding clear and coherent standards of liability for manufacturers. While the Commerce Committee did not wish to move in this area, it is in accord with basic common sense. Unless underwriters can predict with some degree of certainty when and how manufacturers will be held liable, insurer problems with the system are going to continue and fester. As long as those liability rules are fair and balanced, it is difficult to understand why they should be regarded as "anti-consumer." The rules should specify when a defendant will be liable for his failure to design a product and when he will be liable for his failure to warn. Under tort law, the only rational basis for such rules is fault. If you hold a manufacturer strictly or absolutely liable in the design or warning area you create an open-ended legal system that is unpredictable and unaffordable. This is because a person can always design a product better if he spends enough money. For example, one can make a car that floats on water. One can always provide a new warning, with hindsight as one's guide. A manufacturer should be liable when he has failed to act in a reasonably prudent manner and either knows or should have known about a risk. Rules with respect to duty to warn are particularly important -- guidance is needed! Rules can spell out clearly and unequivocally who should be warned. For example, a pharmaceutical company should be informed that it is to warn a physician about product risks as contrasted with giving complex medical terminology to a patient. Today, that area of law is filled with uncertainty: legislation can create rationality and predictability.

If uniform fault-based standards of liability are not included in the bill, a compromise approach would be to adjust the "collateral source rule." This rule allows a claimant to recover money from a defendant even though the claimant has already been compensated for the harm by another source. It is predicated on the concept that a wrongdoer should not benefit from the fact that the claimant has other sources of compensation. But when liability is based on a theory other than negligence, the defendant is not a wrongdoer and the basis for the collateral source exclusion falls apart. In those cases, collateral sources should be admissible and applied as an offset against the damage award. A statute can clearly provide that if a state makes an award on the basis of strict or absolute liability as contrasted with negligence, all collateral sources should be deducted from that award.

It is late in the session and this is an area that this Committee may have to visit in the future, but this year, at the very least, this Committee should support the Kasten-Lugar-Kassebaum amendment that I have mentioned before. Apart from barring liability when products have been unreasonably or unforeseeably misused, it says that a manufacturer should not be held liable when it neither knew nor could have known about a risk. In plain and simple English, it takes absolute liability out of the tort system. This is sound -- the tort system is a means for redressing wrongful conduct and awarding very rich damages as a consequence -- it is a totally inappropriate vehicle for absolute liability, which is part of compensation systems. This Amendment would not create a "standard of liability," but rather a perimeter, beyond which liability could not go. The manufacturer would not be liable if it neither knew nor could have known about a risk. If the Kasten-Lugar-Kassebaum amendment is supported, it needs a provision that says that a manufacturer is not liable if he did all that was practicable in light of existing technology to make his product safe. This puts fairness back into the tort system. Again, common sense should be our greatest guide -- we do not need to go to tons of law books to find a rationale.

Abolish the Unfair Doctrine of Joint and Several Liability.

Common sense says it is simply unfair to make one person pay for what another person did; nevertheless, that is exactly what the doctrine of joint and several liability does. The Senate Commerce Committee has made great headway in this area by providing in S. 2760 that non-economic damages shall not be subject to joint and several liability. Nevertheless, it is also difficult to justify applying the doctrine to economic damages. Again, other than a basis of let us find a "deep pocket", how can we justify making Peter pay for the sins of Paul? We apportion damages between plaintiff and defendant and among defendants when they are suing each other. It is only logical and reasonable to limit liability of a person to his own area of responsibility. Senator Pressler has drafted an amendment to this effect -- this Committee should support that effort.

Punitive Damages -- Let the Jury decide "Guilt," Let the Judge "Sentence."

The Senate Commerce Committee has addressed the topic of punitive damages and made significant improvement in the law. It raised the burden of proof from preponderance of evidence to clear and convincing, making it more like its true sister, the criminal law. Nevertheless, this Committee can improve upon the Senate Commerce Committee's effort by establishing that the judge in punitive damages cases decides the amount of the award in a separate proceeding after the jury determines that punitive damages should be awarded. In other words, make product liability punitive damages work the way our criminal law system works -- a system that this Committee knows well. As you know, judges, in general, do the sentencing. They can take into account many factors and much evidence that is inappropriate for jury consideration. Also, evidence relating to sentencing can prejudice a jury in determining whether a person is guilty or innocent. The same holds true in product liability tort law. We will submit amendments that will improve the punitive damage system by separating out the "finding of guilt," a matter for the jury and the determination of the amount of the award , a sentence formulated by the judge.

Conclusion.

The Senate Judiciary Committee can improve the product liability bill, S. 2760. First, making clear that product liability tort reform is not anti-consumer. Let us destroy the "anti-consumer myth." Second, amend the expedited claim system by introducing finality into settlement offers. Third, include basic standards of responsibility in a product liability bill -- without them there is a hollow core in the legislation. If this Committee believes that is going too far at this time, follow the common sense principle of saying that a manufacturer should not be liable if it has been totally innocent in causing a harm -- the Kasten-Lugar-Kassebaum Amendment. Fourth, support the Kasten-Lugar-Kassebaum Amendment that says that the product liability system should not bear the cost when people unreasonably or unforeseeably misuse or alter products. Finally, joint and several liability reform should be pursued to its logical end and provide that a person should not be liable beyond his own responsibility -- the Pressler Amendment.

These five changes will protect consumers, provide rational rules of liability and end product liability crises once and for all.

FOOTNOTES

[1] Halphen v. Johns-Manville Sales Corp., 484 So.2d 110 (La. 1986).

[2] Kelley v. R.G. Industries, Inc., 497 A.2d 1143 (Md. App. 1985).

[3] Moore v. R.G. Industries, Inc., 789 F.2d 1326 (9th Cir. 1986).

[4] Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986).

[5] Ellington v. Coca Cola Bottling Co. of Tulsa, 717 P.2d 109 (Okla. 1986).

AMENDMENT INTENDED TO BE PROPOSED TO S.2760
THE PRODUCT LIABILITY REFORM ACT

Finality of settlement agreements:

On page 21, insert a period after the word "payment" on line 13, strike all after "payment" and strike lines 14 through 25. On page 22, strike lines 1 through 9.

Discovery procedures under settlement system:

On page 15, line 24, insert "relevant" before "evidence," strike all after "evidence," strike all after "evidence" and strike line 25. On page 16, line 1, insert "and shall" before "extend," strike "for more than ninety days" and insert "as the interests of justice may require."

Court's determination of inclusion or exclusion of dignitary loss:

On page 15, lines 5 and 6, strike "Within fifteen days after the filing of such motion, the" and insert "The" before "court" on line 6. On page 15, line 7, after "motion" insert "expeditiously."

Clarification that bill does not preempt claims based on express indemnity contracts between an employer and defendant:

On page 18, line 13, insert "implied" before "indemnity."

Technical correction to computation of penalty against defendant:

On page 18, line 21, strike "verdict" and insert therein "judgment."

AMENDMENT INTENDED TO BE
PROPOSED TO AMENDMENT NO. ____
(KASTEN-LUGAR-KASSEBAUM AMENDMENT) TO S.2760

THE PRODUCT LIABLITY REFORM ACT

At the end of subsection (b) after "information" insert:

or the ability to eliminate the defect was not technologically or practically feasible.

AMENDMENT INTENDED TO BE PROPOSED TO S.2760

THE PRODUCT LIABILITY REFORM ACT

On page 29, insert the following immediately after line 8:

(d) The trier of fact shall first determine whether compensatory damages are to be awarded. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. In determining whether punitive damages are to be awarded, the trier of fact shall consider--

(1) the manufacturer's or product seller's awareness of the likelihood that the serious harm at issue would arise from manufacture or sale of the product;

(2) the conduct of the manufacturer or product seller upon learning that the product caused harm; and

(3) the duration of the conduct and any concealment of it by the manufacturer or product seller.

(e) If the trier of fact determines under subsection (a) of this section that punitive damages should be awarded to a claimant, the court shall determine the amount of those damages. In making that determination, the court shall consider--

(1) all relevant evidence relating to the facts set forth in subsection (b) of this section;

(2) the financial condition of the manufacturer or product seller;

(3) the profitability of the conduct to the manufacturer or product seller;

(4) the total effect of other punishment imposed upon the manufacturer or product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of other penalties to which the manufacturer or product seller has been or may be subjected; and

(5) the aggregate effect of such punishment upon the ability of the manufacturer or product seller to pay damages in pending or future claims involving persons similarly situated to the claimant.

Mr. **Herman**. Thank you.
Mr. Schreiber.

STATEMENT OF SOL SCHREIBER

Mr. **Schreiber**. Mr. Herman, it is a pleasure to be invited to come here. This is my second time. The last time was a couple of years ago and I ended up speaking last and this time I have the good fortune of speaking last again. I am not sure that is because I have something important to say or, as pitchers in the National League, the weakest hitters come last.

In any case, I have submitted an extensive statement along with attachments. I would like to take this opportunity, however, not to address you by reading from my statement but to speak informally on what I see as the problem.

I speak as a private citizen who has been an attorney for more than 30 years. I have been a plaintiff and defense counsel in the personal injury insurance and civil litigation field for 20 years. I have been a judicial officer for 7 years as a U.S. magistrate in the Federal court. In addition, I have been a special master on major Federal litigation including the agent orange case from mid-1982 to February 1984.

I have edited more than 30 books in the field of civil litigation and I have been an adjunct professor for more than 15 years at the Fordham Law School. I have taught lawyers for more than 25 years in continuing legal education areas.

Finally, for more than 3 years I ran a major legal, risk management, and insurance program for 10 leading hospitals in New York as well as 80 nonprofit philanthropic institutions. Today's problems are not insurmountable, but they are very complex. I suggest to you, however, that changes and experiments are taking place.

In the last 3 months, more than 34 States in the United States have had hearings and have made extensive changes in the tort and insurance fields. The problem is fundamentally a problem of continued changes in the law and in insurance. One cannot fully understand product liability if one does not understand the changes, and problems in insurance coverage.

When I was last here, a year or so ago, I said that there was going to be an insurance crisis and, like the messenger in old Greece, I may have to pay the price for being the messenger.

The central insurance problem is the withdrawal of English insurers from the market. They say that will not come back unless we make extensive changes. You cannot have insurance at a sensible price unless you have competition in the reinsurance market. If you do not have competition, you must consider regulation.

I suggest to you that it is the reinsurance problem which, by the way, is beginning to show slight improvement, that is causing major dislocation. But let us now look at the product bill itself: I have examined title II on the expedited claims system and I do not think it will work. I seriously doubt that any plaintiff's lawyer worth his salt would recommend it to a client. I realize that many people have worked very hard on alternatives. I suggest to you however that the only way to limit cases coming into the court is to provide both rewards and punishments. If you do not reward people for moving cases fast, or if you do not punish them for slowing it up, you cannot solve the problem.

I have suggested three alternatives in my paper. One makes use of the income tax law, which I will not go into in detail because of my limited time. As you know, personal injury claims are not taxable and the defense of cases is deductible. If you structure the income tax laws in a way which would reward early disposition or punish late disposition, you may be able to resolve the basic problem. If you say to the insurance industry if you delay the cases you will not be permitted a deduction, or in turn if you say to plaintiffs that the rejection of fair offers will be costly from a tax point of view.

Incidentally, many lawyers will tell you that if you withdraw the deductibility of civil legal costs, you will end the litigation explosion in the United States. Today the defense of most civil litigation is deemed to be a deductible cost of doing business from income taxes due, thus the Government shares in the cost of every litigated case.

I also suggested a method of using a penalty or a reward system. When plaintiff makes an offer of settlement and the defendant refuses, if at trial plaintiff succeeds in getting that amount or more, he should get a 25-percent bonus. If the defendant makes an offer and the plaintiff refuses, and at trial plaintiff does not match or pass the offer, he will pay a price of 25 percent. It is reward and punishment that should bring about a fundamental change.

Finally, I suggest that this bill did not take advantage of structured settlements and periodic payments. Actuaries will tell you that the cost saving could be in the area of 20 to 25 percent.

On the second part of the bill, I have made six fundamental suggestions. One, you shouldn't take away strict liability from the retailer or the wholesaler unless you provide a means of bringing in out-of-State and foreign manufacturers. There will be chaos in the courts; transactional costs will skyrocket, and claiment's rights to sue will be impaired, if you say that the injured person can sue the retailer only on negligence when the product was manufactured in out-of-State or foreign lands. Unless you permit plaintiffs to bring in out-of-State and foreign manufacturers into our courts, it will not have a salutory effect.

Two, on punitive damages, may I offer this suggestion: If punitive damages is a penalty, then do not permit insurance coverage. Twenty-five States now say that a defendant may insure against punitive damages; 36 States say they can insure against punitive damages if it is of a vicarious-liability nature. If defendant's conduct is outrageous and he is ordered to pay punitive damages, then take away insurance coverage.

Three, with respect to excessive costs and frivolous cases, I must confess I may have lived in a different arena. I have handled thousands of cases as a private counsel and as a judicial officer, and I do not believe that this is a real issue worthy of the draconian measures such as sanctions. It is not frivolous conduct that creates the problem. It is the fact that the law is changing. For example, contributory negligence as a complete defense is no longer the rule in many courts, therefore in cases that seem to suggest that the plaintiff was partially at fault, the plaintiff can still come into court and seek some money.

The other problem is if you really come down hard on lawyers and impose sanctions, you will certainly penalize some of the most conscientious lawyers. The few lawyers that perform improper activities will continue to perform them. While many other lawyers will be frightened to pursue worthy causes.

Four, the workers compensation benefit exemption is a sound one if it is a policy decision made by legislatures. However, you should not reduce judgments by workers' compensation awards as well as workers' compensation payments that are still due. Only limit it to how much was paid, otherwise the confusion in trying to determine future awards will create terrible problems.

Five, with respect to several liability for noneconomic damages—the framers of the bill have decided that California proposition 51 should be followed, although I believe there are serious reservations in doing so. What you have to be careful about is will you have the same problem that California courts are now having: Does it apply to pending cases or does it apply only to future cases? I think the present bill has been written in such a way that it applies only to future cases.

As to my sixth recommendation insurance reporting, I agree with many of the things Mr. Leslie Cheek has said. But as to the burden of reporting I say to you: Until you know where the money is coming from and where it is going, you cannot fully understand the problem or its complexity.

For example, in the State of New Jersey, a report 2 days ago showed that in 80,000 cases, only 43 were in excess of $300,000. What does that do to the issue of caps? Are we really fighting an artificial battle when we say that we should have caps if most of the cases are coming in under $200,000 or under $300,000?

Finally, in conclusion there are many other problems which Congress has to examine. For example, how much of an impact were the settlements in the mass tort litigation? We do not know if the problem really has been due to the asbestos, to the DES, to the agent orange settlements. In addition, we have an entirely new insurance policy which has many more defenses and many more exclusions. How significant an impact will these restrictions have on the tort-insurance problem. In my brief remarks I have tried to point out the complexities of the product-insurance controversy and suggest some approaches which may bring change without being unfair to either side.

I thank you again, Mr. Counsel, for your kindness in giving me the extra time.

[The prepared statement of Mr. Schreiber follows:]

STATEMENT OF SOL SCHREIBER BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE ON SEPTEMBER 10, 1986 CONCERNING S.2760 - THE PRODUCT LIABILITY REFORM ACT

I appreciate the invitation to testify on S.2760.

My remarks concerning the feasibility of the provisions of this Act are based upon my more than 30 years experience in the civil litigation field as a plaintiffs' and defense counsel; a judicial officer (United States Magistrate 1971-78) and Special Master in complex federal litigation, including the Agent Orange case (3/82 - 1/84); as a teacher of both law students and lawyers (Adjunct Professor, Fordham Law School 1972-) and Planning and Program chairman of more than 75 continuing professional educational national programs and the editor of more than 30 CLE publications. A more detailed summary of my background is attached at the end of my remarks.

OVERVIEW OF THE PROBLEM

The product liability problem is due to a multitude of factors including the expansion of the procedural, evidentiary, substantive and damage law; and a severe dislocation or breakdown in the insurance and reinsurance markets. For a more detailed examination of the latter issue, your attention is directed to the attached outline of my remarks at the Congressional Research Service' breakfast meeting of July 23, 1986 on "The Origins and Implications of Current Insurance/Liability Problems."

Despite extensive and sincere efforts by the drafters, I do not believe that the contents of S.2760 will significantly change the direction of the law of products liabiity or bring about a more efficient and cost-saving handling of product liability cases. The proposal will not succeed in limiting or reducing suits nor will it provide injured parties with a fair resolution of their damage claims.

Title II of the proposed Act is unusually complicated and fails to reward claimants who will seek the expeditious handling of their claims. In fact, it may well penalize them. For example on the issue of lost income, the amount to be awarded would be net of all taxes. Yet, if a claimant pursued his action by filing a suit, his recovery or settlement during trial would be non-taxable; thus, his recovery is far less under the expedited settlement procedure than if he brought a claim to settlement or judgment in a court of law. In addition, the cap is unusually harsh. Recent state legislators have given consideration to such caps. If such limits were necessary or desirable, the drafters would be well advised to follow the most recent Massachusetts or Washington State approach to caps. There is a real question concerning the propriety of having any caps. A recent study in the State of New Jersey of 80,000 civil cases, resolved from January 1, 1980 to February 28, 1984, indicated that only 43 cases resulted in awards of more than $300,000 (see Journal of Commerce 9/4/86, p.10A). Thus, we may be spending a great deal of time and effort on an issue which has no significant financial effect but which would deny fair compensation to victims of major injuries.

I suggest that two alternative approaches be considered in attempting to bring about early settlements and reduce the number of filings and transactional costs.

The first aproach would set up a system of rewards and punishments. It would center on the taxability of recoveries and the deductibility of attorneys' fees for the defense of claims. As was noted above, personal injury recoveries are not taxable and legal costs in defense of claims are deductible.

To encourage early negotiations and settlements, I suggest that the tax laws be amended so plaintiffs, who fail to recover an amount in excess of offers made by the defendants, would have their recoveries taxed. In turn, when a defendant fails to accept an offer of settlement made by the plaintiffs and the offer is met or superceded by judgment then all of the defendants legal costs in the defense of such action would be deemed non-deductible for tax purposes. While this may appear to be an unusual use of the tax laws, it would provide incentives for early and proper disposition of cases and indirectly it could raise a considerable amount of money for the U. S. Treasury. As an aside, it has often been said by lawyers that much of the "litigation explosion" would be sharply reduced should Congress halt the deductibility of legal costs. In lieu of a tax approach an alternative would be a penalty of a 25-30% reduction if defendants' offers were not exceeded. In turn a similar percentage increase in plaintiffs' recoveries would occur when defendants reject offers which are subsequently met or exceeded by judgments.

The second proposal concerns structured settlements or periodic payments of judgments. While the present bill has some brief language concerning this matter I believe that further consideration should be given to applying the structured vehicle to all settlements and/or judgments over $250,000 in the product liability field.

There are many in the actuary field who believe that the structured settlement approach should bring about substantial savings in the 20-25% range. Most major damage claims are caused by economic losses and serious personal injuries which extend over a long period of time. Thus, a structured settlement approach would provide for such monies to be paid over such a period while bringing about a considerable savings of monies due to the actuarial approach in dealing with structured settlements or damages.

Attached below is a copy of my proposed 'Structured Settlements or Periodic Payment of Judgments' which I sent to the Chief Counsel of the U. S. Senate's Committee on Commerce, Science and Transportation on May 30, 1986.

This approach would also bring about a more equitable resolution to the contingency fees dispute. In the attached proposal, Section (5) provides that such fees would be based on a cost of the annuity covering a structured settlement or judgment.

The remainder of remarks will deal with a number of legal changes to be found in S.2760.

Section 302 - Uniform Standards of Project Seller Liability

This section significantly changes the present law concerning the retailers or wholesalers liability. Presently, in most jurisdictions, such parties are subject to strict liability suits. The new change would bar such claims except where the manufacturer is not subject to service of process or the claimant would be unable to enforce a judgment against a manufacturer. In its newly revised form this section, I believe, would not reduce transactional costs but increase them. In my experience most retailers or wholesalers are now covered by their manufacturer's insurance policies. Furthermore, the proposed language would cause protracted delays for legitimate claims. With the increasing manufacturing of products outside of the United States, the elimination of strict liability with respect to retailers or wholesalers would place injured parties in a most difficult position. At very least the section should be amended to require that the retailer or wholesaler be required to implead in the manufacturer. Alternatively, a presumption should be written into the section that out-of-state manufacturers are presumed to know or reasonably should know that their products would be distributed within a particular state, thus, making them available for service of process under the "stream - of - commerce" theory, and providing a basis for asserting personal jurisdiction over a non-resident manufacturer. This matter will be examined by the U. S. Supreme Court in its next term in the case of Asahi Metal Indus. v. Supreme Court, cert. granted, 106 S.Ct. 1258, 89 L.Ed. 2d 569 (1986), and is also more fully reviewed in the recent New Jersey Supreme Court case of Gendler & Co. v. Telecom Equipt. Corp. and Nippon Electronic Co., 54 L.W. 2646 (6/24/86).

Section 303 - Punitive Damages

In this section the burden of proof is changed from preponderence to clear and convincing evidence. At present there is a raging dispute as to whether the number of punitive damage cases has increased significantly. The change in the burden of proof, however, will not bring about a significant change in the number of punitive damage awards. Of more importance, however, is the fact that approximately 25 states permit the insurability of punitive damages and approximately 36 states permit insurability of punitive damage if it is based on vicarious liability (see Morrison, The Insurability of Punitive Damages). As Senator Pressler has indicated in his Additional Views to the Conference Report, on p. 97, "I believe the rule against insurability of punitive damages should be universal in its application".

Section 304 - Uniform Time Limitations on Liability

Implementation of the discovery rule in this section is a sound recommendation and should be supported. The issue of a 25-year period of repose with respect to capital goods should not cause a signficant impairment of the rights of claimants.

Section 305 - Counsels' Liability for Excessive Costs

This section may create serious problems. The proposed standards are rather loose and the sanctions could be "frightening". Many federal and state courts are now developing rules on such matters and the proposed change may bring about serious dislocations. Furthermore, the conference report on subsection (c) should include language from the advisory note to Rule 11 of the Federal Rules of Civil Procedure which reads as follows: "The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid use of the wisdom of hindsight. . . "

Section 306 - Record Retention

This section incorporates the present law and is not controversial.

Section 307 - Uniform Standards for Offset of Workers' Compensation Benefits

This section will reduce damage awards by amounts paid as workers compensation benefits and exclude liens or claims for subrogation. It is a policy change that should reduce transactional and other litigation costs. There will, however, be some difficulty in reducing awards by "the present value of all workers compensation benefits to which the employee is or would be entitled for such harm". It would be less litigious and more practical to reduce damage awards only by the amounts of compensation benefits actually paid up to the time of judgment or settlement.

Section 308 - Several Liability for Non-Economic Damages

This section tracks the recent adoption of Proposition 51 by the California voters. In view of the language of Section 105(a) dealing with the Effective Date, this proposal should avoid the present controversy in the California courts concerning the application of the new rule to pending cases. The Effective Date language of Section 105(a) clearly states that pending actions would not be affected by this change. It is a public policy change of considerable significance In its present form, however, it is probably the most well-balanced of all the many variations currently being considered by the states.

Section 309 - Forum Non-Conveniens

Section 310 - Admissible Evidence

These sections track present law in most jurisdictions and are not of major controversy.

Title IV - Product Liability Insurance Reporting

This is an important addition worthy of strong support. As I have indicated in my attached outline of prior remarks the insurance issue is an overriding one in both the product liability as well as the general tort field. It is important to know what is really happening in the handling of such cases. The contentions of the insurance industry that these reporting requirements would be burdensome should not dissuade the drafters of the bill.

Conclusion

There are, of course, other significant issues that the bill has not considered. These must be dealt with by the Congress in the not-too-distant future. They include mass tort litigation and the feasibility of a compensation system for damages or injuries arising out of the bio-technology field. With respect to mass torts, we do not as yet know whether the recent settlements, court judgments and defense costs in the Asbestos, Agent Orange, DES and Dalcon Shield cases were the major causes for the insurance dislocation in the products arena. Such information would be of considerable assistance in evaluating the true cost of product liability insurance and may serve as a basis for a national compensation approach.

A PROPOSED STRUCTURED SETTLEMENT OR PERIODIC PAYMENT OF JUDGMENT

SEC. *** (a) Any tender of settlement or any judgment under this Title shall be made by:

(1) the payment of a lump sum if the settlment or judgment is less than $250,000.;

(2) in all other recoveries under this Title, lump-sum payment shall be made for all net economic loss incurred up to the date of the settlement or judgment, payment of dignity loss as of the date of the settlement or judgment up to $250,000, and an annuity issued by a qualified insurer to pay future economic and dignity losses as they are incurred.

(b) Any settlement or judgment payment under this Title of which an annuity is a component thereof must satisfy the following requirements:

(1) The settlement agreement or judgment must specify for each claimant, the amount of:

(a) any past damages; and

(b) any future damages and the periods over which they will accrue, on an annual basis, for each of the following types:

(i) medical and other costs of health care;

(ii) other economic loss; and

(iii) noneconomic loss.

(2) (a) In all cases covered by this Title in which future damages are payable in period installments, the liability for payment of any installments for medical or other costs of health care or noneconomic loss not yet due at the death of a person entitled to receive these benefits terminates upon the death of that person. The liability for payment of any other installments or portions thereof not yet due at the death of the person entitled to receive them likewise terminates except as provided in subsections (b) and (c).

(b) If, in an action for wrongful death, a settlement or judgment for periodic installments provides payments to more than one person entitled to receive benefits for losses that do not terminate under subsection (a) and one or more but fewer than all of them die, the surviving beneficiaries succeed to the shares of the deceased beneficiaries. The surviving beneficiaries are entitled to shares proportinate to their shares in the periodic installments not yet paid, but they are not entitled to receive payments beyond the respective periods specified for them in the settlement or judgment.

(c) If, in an action other than one for wrongful death, a settlement or judgment payment for periodic installments is entered and a person entitled to receive benefits for losses that do not terminate under subsection (a) under the settlement or judgment dies and is survived by one or more qualifying survivors, any periodic installments not yet due at the death must be shared equitably by those survivors. Amounts due each survivor may not exceed the survivor's economic loss resulting from the death.

(d) "Qualifying survivor" means a person who, had the death been caused under circumstances giving rise to a cause of action for wrongful death, would have qualified as a beneficiary at the time of the death according to the law that would be applied in an action for wrongful death by the jurisdiction under which the issue of liability was resolved in entering the settlement or judgment payment for periodic installments.

(3) An assignment of or an agreement to assign any right to periodic installments for future damages contained in a settlement or judgment entered under this Title is enforceable only as to amounts:

(a) to secure payment of alimony, maintenance, or child support;

(b) for the costs of products, services, or accommodations provided or to be provided by the assignee for medical or other health care; or

(4) Periodic installments for future damages contained in a settlement or judgment entered under this Title for loss of earnings are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt under any applicable law. Except to the

extent that they may be assigned under subparagraph (3), periodic installments for all other future damages are exempt from garnishment, attachment, execution and any other process or claim.

(5) The amount recovered for purposes of computing an attorney contingent fee shall be based on the cost of the annuity.

TOPICAL OUTLINE OF REMARKS OF SOL SCHREIBER AT THE CONGRESSIONAL RESEARCH SERVICES' BREAKFAST MEETING, WEDNESDAY, JULY 23, 1986 ON

"THE ORIGINS AND IMPLICATIONS OF CURRENT INSURANCE/LIABILITY PROBLEMS

I. Origins

  1. Known Causes
     a. underpricing; unrealistic limits; seeking high-interest rates at any price
     b. poor reserving practice
     c. increasing insolvencies
     d. mass withdrawal of foreign reinsurers
     e. extensive and unprofitable diversification
     f. failure to recognize changing social and legal concepts
  2. Unknown Causes
     a. major financial dislocations in the domestic insurance industry
     b. was there a collapse of the foreign reinsurance market
     c. impact of mass tort litigation: Asbestos, Agent Orange, etc.
     d. the underwriting 'crisis': is it due to a "colossal conspiratorial fraud"; boycott; conscious parallelism; pricing in a non-competitive market
  3. Changing Legal Concepts
     a. expanding tortious liability theories
     b. the emerging constitutional and civil rights claims
     c. broadening of damage theories
     d. is there a "lawsuit crisis"

4. State Regulatory Scene

   a. staffing inadequacies and the legal barriers arising from interstate nature of liability coverage

      b. the "edge of cliff" scenerio and state guarantee funds

      c. recent insurance-tort law experimentation by 40 state jurisdictions:

         (i) insurance changes: prohibition on mid-term cancellations and non-renewals; rollback of rates; flex-rating; mandatory joint underwriting associations for high-risk lines; requirements that insurers provide data on claims and awards by class

         (ii) tort changes: caps on non-economic damages; contraction of joint and several liability; restricting use of experts; limiting non-for-profit directors liabiity; new Delaware law concerning directors' liability and indemnification

         (iii) movements in the states of Washington, California, Florida, New York, Massachusetts and Delaware

II. Implications

5. Present Market Conditions

   a. lack of capacity: estimated $50 billion shortfall;

   b. critical need for financial infusion in the reinsurance areas: opening the doors for the entry of new players (e.g. banks) in limited reinsurance fields

   c. non-availability of coverage for certain classes and continued market contraction; are insurers taking risk out of insurance coverage; limited reentry of insurers in the difficult lines of business

   d. impact of the commercial picture upon personal lines (home, auto, etc. coverage)

   e. forthcoming major litigation involving the terms of the new claims-made policy and restrictive coverage language

6. New Directions:

   a. emerging structures: risk retention; offshore and domestic captives; formation of new reinsurers; municipal pooling

7. Financial Issues (new profit centers):

   a. impact of the Equity Investment forces: recent infusion of $8 billion of equity in the insurance field; predicted profits of $4 billion in 1986; $10 billion in 1987 and $14 billion in 1988

b. soundness of the pricing structure: are brokers, intermediaries, primary and excess carriers extracting too great a "piece of the pie" in the present non-competitive market

8. Critical Legal Areas

a. product liability legislation: need to incorporate

(i) alternative dispute resolution approaches

(ii) structured settlements, periodic payments of judgments and counsel fees

(iii) reexamination of tort concepts: multiple punitive damages; strict liability for retailers and wholesalers; jurisdiction over foreign manufacturers; failure to warn and state-of-the-art controversies; caps on non-economic damages - the Mass. and Wash. experiments

b. medical malpractice field - presently most programs insolvent; new approach required

c. legal malpractice field; - 300-500% increase in insurance costs as of 7/1/86

d. directors and officers' coverage problems for the non-for-profit, small and new business segments

9. Possible Roles for the Federal Government

a. monitoring role: gathering data to determine the true picture

b. regulatory role in the reinsurance and off-shore captive areas

c. providing tax benefits for self and domestic captives

d. formation of federal insurance programs for uninsurable risks, similar to crime, political, flood and crop insurance - also cf. Texas windstorm and Calif. brushfire pools

e. products, drug (vaccine) medical malpractice and mass tort legislation

f. will the application of the anti-trust law to the insurance industry help? The 'drying-out' of anti-trust ligitation.

g. a two-tier regulation proposal: regional or state for personal lines; national or federal for business and professional lines

10. Philosophical Question of the Day: should the insurance industry be viewed as a public utility?

QUESTION FOR MR. SOL SCHREIBER
BY SENATOR MITCH McCONNELL

You stated that the liability standards for product sellers might result in non-recovery for some claimants if they are unable to bring into court a manufacturer from a distant state or foreign country, but is it not true that the provision itself states that a product seller shall be subject to liability as if it were a manufacturers if the manufacturer is not subject to service of process?

RESPONSE BY SOL SCHREIBER TO QUESTION BY SENATOR MCCONNELL

The mere fact that the product seller will be subject to liability if a manufacturer is not subject to service of process will not work, in my judgment.

In the litigation arena the issue of whether out-of-state or foreign manufacturers can be brought in to American courts is a very expensive and protracted process. The transactional costs are very high and, in many jurisdictions, the right to appeal such fundamental issues as service of process often delay the litigation for many years.

In addition, the proposal suggests that the product seller may also be subject to liabilty if a claimant is unable to enforce a judgment against the manufacturer. This will also create serious delays and extraordinary costs. The provision does not require that a manufacturer make a showing of his ability to meet a judgment when he is first sued, thus, a case may be litigated for three to four years or longer and then the claimant will have to seek redress from the product seller. Will the courts require a new suit or will the seller be bound by the verdict?

I suggest that these will be real problems and create serious dislocations.

Mr. HERMAN. I thank you for your participation. I have two very short questions and I hope that you might provide two very short answers to them.

Is there a growing consensus or growing trend, within academia at least, that notions of fairness require the general application of a fault-based standard for product liability suits?

Mr. SCHREIBER. I will speak second.

Mr. OWEN. Mr. Chairman, I would answer that as: "Yes among the more prominent commentators, but no generally." This may be because the more prominent commentators by now have been around the block several times and have reached middle age or older—which thus may demonstrate the tendancy toward conservatism of people as they grow older, or maybe more broadly a maturation of social thought in the 1980's from the more exuberant attitudes of the sixties and early seventies.

I do think there is a significant retreat among the major academics away from a belief that strict liability in principle is necessarily the soundest approach for all forms of product liability and a growing acceptance among many commentators that negligence or something like it is preferable. I would add, however, that in my communications with hundreds of law professors connected with the solicitation of the petition, I did see from across the country what I had not realized was still there in such force—and that is, a very large segment who still believe fervently in the original goals of strict tort liability.

I would suggest, then, that the petition represents something of a middle ground between these two perspective—between true strict liability with full tort damages, which was the original Prosser and Restatement view, and the true negligence approach which indeed some leading academic commentators do espouse.

May I make one additional comment responsive to Senator Simon's question to each panel concerning the desirability of attempting to form a consensus on the content of such a bill?

Mr. HERMAN. Go ahead.

Mr. OWEN. Returning to what Professor Schwartz was saying, about how things have come full circle, I am reminded of his excellent stewardship at the helm of the Commerce Department task force in the 1970's. That approach seems to me much more productive than simply gathering together key players from the different interest groups for informal discussions.

Mr. HERMAN. We need to conclude this hearing. The room is going to be utilized for another hearing this afternoon.

I thank you for your participation. There will be additional questions submitted to you in writing. Thank you again.

[Whereupon, at 1:12 p.m., the committee was adjourned.]

APPENDIX

ADDITIONAL STATEMENTS AND VIEWS

Statement of the Business Roundtable
on
Product Liability Reform Act (S.2760)

Given by

Robert H. Malott
Chairman and Chief Executive Officer
FMC Corporation

and

Chairman, Tort Policy Task Force,
The Business Roundtable

As chairman of the Business Roundtable's Tort Policy Task Force (composed of 72 Chief Executive Officers), I submit the following testimony on behalf of the Roundtable which strongly advocates reform of the current tort law system. In the particular area of product liability, we support the Product Liability Reform Act (S. 2760) but advocate four amendments to this bill which I will discuss.

Developments in tort law over the past several decades have resulted in such vastly increased liabilities for U.S. businesses, professionals and government agencies that in my opinion, comprehensive tort law reform is urgently needed. These increasing liabilities are interfering with orderly planning, are creating major losses, and have made liability insurance either extremely costly or unavailable.

This rising tide of liability litigation is undermining the competitiveness of U.S. industry, forcing increasing numbers of products off the market, and costing American business billions of dollars each year.[1] Ultimately, it is the U.S. consumer who must pay for this litigation mania -- through higher product prices and the reduced availability or outright disappearance of essential goods and service

What is causing these problems? I attribute the current situation to the following: first, the ambiguity of current liability laws; second, an increasing acceptance of the concept of compensation entitlement; and third the contingency system for compensating the legal profession.

Let me review these problems in greater detail and then address specific aspects of the proposed legislation.

Ambiguous Liability Laws

Since the early 1960s, both state and federal courts have relentlessly expanded the concept of liability for product-related injuries -- moving it increasingly away from a fault-based standard.

The courts developed a new legal theory, strict liability, to enable claimants to recover damages for injuries caused by defectively manufactured products. This happened because the courts believed that business -- rather than the injured party -- should bear the cost of manufacturing errors, regardless of fault.

Then, the concept of strict liability was extended from defects in manufacturing to defects in a particular product's design, in its operating instructions, or in its safety warnings. In essence, the focus of product liability was shifted from the conduct of manufacturers to the condition of the product itself. However, unlike the test for manufacturing defects, there are no clearcut standards to guide judicial decisions on the adequacy of a product's design or its safety warnings.

Although some 30 states have now enacted product liability statutes, no two are alike. Consequently, cases based on similar facts, but tried in different states, can produce strikingly different and often contradictory judgments.

Such inconsistency in product liability judgments has produced enormous confusion among manufacturers and consumers alike, with neither side knowing what rights or responsibilities they have and what limits, if any, there are on liability.

Other significant developments affecting liability judgments include 1) imposition of market-share liability on businesses in the same industry or involved in common activities even though no individual business is shown to have caused the injury; 2) development of the doctrine of joint and several liability under which one party with "deep pockets" may be required to pay all damages even though other parties are also at fault.

Entitlement to Compensation

I believe another factor contributing to the chaos in liability law is the growing "attitude of entitlement" in compensating claimants, even in those cases where it is obvious that the manufacturer cannot be charged with responsibility or, at a minimum, responsibility is shared between the manufacturer and the claimant.

In addition to compensation for economic injuries, juries have increasingly been imposing huge awards for largely unmeasurable non-economic loss, including punitive damages and awards for "pain and suffering". In America, unlike any other industrialized country, the award of non-economic and punitive damages is virtually open-ended. These awards are having an enormous adverse impact on the costs and the unpredictability facing U.S. businesses in product liability cases.

Lucrative Contingency Fees

The third factor contributing to the number and cost of liability claims is the contingency system for determining legal fees.

Plaintiffs with contingency fee agreements with counsel do not incur liability by initiating action. This tends to encourage plaintiffs to pursue injury suits even if the evidence for their claims may be relatively weak. At the same time, with liability awards now reaching a million dollars or more, plaintiff lawyers have a powerful incentive to keep filing liability cases, even if the prospect of winning any one case is uncertain.

In addition, continency fees tend to increase the size of injury awards, as juries factor in the cost of legal counsel when determining the total size of damages for the plaintiff.

Indeed, if one considers the legal fees for both plaintiff and defendant, more money is being paid today to adjudicate a claim than is being paid to compensate the claimants. It is estimated that lawyers from both sides typically receive two-thirds of product liability suit judgments.[2]

Affordability and Availability of Liability Insurance

There is another issue worthy of note. Among the problems resulting from the surge in litigation is the affordability and availability of liability insurance. Liability insurance is critical to the operation of businesses and state and local governments. Nevertheless, because of the growing liability crisis, insurance coverage is being cancelled, is available only on a claims-made basis, is renewed only at substantially higher rates, or is subject to lower limits of liability. This insurance problem is placing a massive burden on both the private and public sectors, which must either operate without insurance or pay increasingly higher premiums.

Proposals to increase insurance regulation will not remove the underlying cause of the insurance crisis -- the high costs and uncertainties of the tort liability system. As you know, in February of this year, a Tort Policy Working Group appointed by the Attorney General of the United States and consisting of representatives of ten federal agencies and the White House issued a report on "The Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability" (the Attorney General's Tort Policy Report). The report concluded that the problem rests primarily with the tort liability system rather than with the insurance regulatory system.

Recommendations

The Business Roundtable recognizes that individuals injured through the intentional or negligent wrongdoing of others are entitled to be compensated for their injuries. The Roundtable respects those plaintiffs' rights, but, at the same time, also respects the rights of manufacturers and consumers who bear the burden of unrealistic litigation costs. For that reason, the Business Roundtable for the past five years has recommended comprehensive state and federal changes to redress current imbalances in the tort liability system. The Senate Commerce Committee should be commended for addressing an issue of such critical importance and for voting out a product liability reform bill. We hope the Judiciary Committee and the

Senate will similarly recognize the need for reform and take action on S.2760.

But the Business Roundtable advocates four amendments to S.2760.

First, eliminate joint and several liability.

While S.2760 abolishes joint and several liability for non-economic damages, it does nothing for economic damages. The bill should end joint and several liability for both economic and non-economic damages.

Second, incorporate a fault-based standard.

Fundamental to the American system of justice is the concept that if one is not at fault, one should not be held liable. Yet current liability laws ignore that concept. Any federal legislation should ensure that a defendant will be found liable only when the defendant is at fault for injury. S.2760 currently contains no such provision.

Third, delete current language requiring reporting by insurance companies.

It's my understanding that comprehensive data are already available through the National Association of Insurance Commissioners and that this organization has offered to refine its current reporting procedures to meet the needs of the Commerce Committee as reflected in S. 2760.

Fourth, raise the standard for awarding punitive damages to a test of malicious conduct.

The "conscious, flagrant indifference" standard proposed in S.2760 may, in fact, cause an increase in the number of punitive damages claims. We strongly urge that punitive damages be awarded only in cases of malicious conduct.

CONCLUSION

Something must be done to redress current imbalances in the system, particularly relating to product liability. The Product Liability Reform Act, amended as described above, would counter escalating problems posed by inconsistent state laws; protect the rights of plaintiffs, manufacturers and consumers; ameliorate insurance affordability and availability problems; and enhance the competitiveness of U.S. businesses.

On behalf of the Business Roundtable, I thank you for this opportunity to comment on this critical issue and strongly urge your Committee to support this legislation.

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[1] Time; "Sorry, Your Policy Is Cancelled"; March 24, 1986; pp. 16-26.

[2] Wall Street Journal; "Tort Reform"; April 7, 1986; p. 12, also,

The Institute for Civil Justice, "Changes in the Tort System: Helping Inform the Policy Debate, June 1986.

SUMMARY OF RESEARCH RESULTS ON PRODUCT LIABILITY
STATEMENT PREPARED BY DEBORAH R. HENSLER
INSTITUTE FOR CIVIL JUSTICE

Mr. Chairman and Members of the Judiciary Committee. My name is Deborah Hensler; I am the research director of The Institute for Civil Justice (ICJ) at The Rand Corporation. Rand is a private non-profit corporation that conducts public policy research. The Institute was established at Rand in 1979 to conduct policy analytic research on the civil justice system. Its research is supported primarily by corporate and foundation grants.

The purpose of my testimony is to summarize the results of our research that are most relevant to a consideration of the current product liability system. My testimony will touch on four topics, each of which has been the subject of empirical research at the ICJ.

1. Trends in product liability litigation;
2. Expenditures for liability cases closed in 1985;
3. Effects of product liability lawsuits on corporate behavior; and
4. Special problems posed by mass toxic lawsuits.

TRENDS IN PRODUCT LIABILITY LITIGATION

There has been considerable dissension over the past several months about how much, if at all, the U.S. tort liability system is changing. Much of this dissension stems from the misinterpretation of civil justice system statistical indicators. Judicial and legal policymakers have long operated as if they were dealing with a single homogeneous tort liability system. Indicators of aggregate change in the system -- for example, civil filing rates -- are assumed to reflect equivalent changes in all its components. But there is increasing evidence that this picture of the tort liability system is no longer accurate, if indeed it ever was. Each category of tort cases -- automobile accidents, product defect suits, professional malpractice, and so forth -- appears to have its own social and economic dynamics. This is not surprising once we consider the differences among these different case categories in substantive and procedural laws, party characteristics, litigation practices, and financial and social stakes. In describing trends in product liability, then, it is important to distinguish those statistical indicators that apply specifically to this kind of lawsuit from those that apply to tort suits more generally.

With regard to product liability litigation, we can ask the following questions:

1. Is the amount of litigation increasing, decreasing, or remaining roughly the same?
2. Has there been any change in the proportion of suits that are decided in the plaintiff's favor?
3. Have the amounts juries award to plaintiffs increased, decreased, or remained roughly the same?
4. What has been the role of punitive damage awards?
5. Is there any evidence that juries apply different standards in deciding product liability suits than they apply in other sorts of tort litigation?
6. Have the amounts insurers can expect to pay out increased, decreased, or remained roughly the same?

Unfortunately, our ability to answer these key questions for liability specifically is severely constrained due to the unavailability of basic data on the civil justice system.

Amount of Product Liability Litigation

From data reported by the federal district trial courts, we know that the number of product liability lawsuits filed in the federal system has increased five-fold from 1975-1985 (from about 2400 suits to about 12,500 suits); because other types of tort filings in the federal system have not increased at a similar rate, product liability cases now account for about 30 percent of all federal tort filings, compared to 9 percent in 1975. But we don't know whether this trend was matched in state trial court systems, where an estimated 95 percent of all tort cases are filed, because most state court systems do not tabulate cases by type.

Over the past half dozen years, the ICJ has assembled a statistical data base that tracks the results of all civil jury trials held in trial courts of general jurisdiction (state and federal) in Cook County, Illinois and San Francisco, California from 1960 to 1985 (Shanley and Peterson, 1983; Peterson, 1984). These data indicate that the number of product liability lawsuits that were *tried* in San Francisco in the early 1980s was about the same as the number tried twenty years previously. At the beginning of the period 54 product liability cases were tried to verdict. By the early 1970s the number had more than doubled to 127, but in the succeeding period it diminished again; only 49 product liability cases were tried from 1980-84. Throughout this period, product liability cases constituted 5 to 10 percent of the total number of civil cases tried. In contrast, in Cook County (a much larger jurisdiction) the number of product liability cases increased steadily from 60 at the beginning of the twenty-year period to 227 at the end, an increase of almost three hundred percent. Because the civil trial caseload is much larger in Cook County than it is in San Francisco, product liability cases never accounted for more than 6 percent of the total number of civil cases tried. As these numbers indicate, there is considerable fluctuation in the number of trials over time and across jurisdictions. Perhaps more important, because the number of cases going to trial can rise and fall for a number of different reasons (for example, changes in lower court jurisdictional limits, or changes in settlement practices), we cannot tell from these data whether the underlying product litigation rate (i.e. number of filings) in either jurisdiction was increasing or decreasing.

Plaintiffs' Success Rate in Product Liability Trials

Data from the jury verdict statistical data base can be used to describe trends in jury trial outcomes, at least from these two major metropolitan areas. Our analyses of these data indicate that the proportion of product liability trials resulting in awards for the plaintiff increased from about 30 percent in the early 1960s to about 50 percent by the early-1980s in Cook County, but decreased somewhat from 57 percent in the early 1960s to 52 percent in the 1980s in San

Francisco. In both jurisdictions, by the end of the period, plaintiffs in product liability cases (once viewed as "long-shot" cases) had an equivalent or better chance of winning than plaintiffs in most other tort liability suits.

Trends in Jury Awards

There are several different statistical indicators of trends in monetary awards. The median, the point dividing the top and bottom halves of the award distribution, is often used as an indicator of the "typical" jury award, since its value is not affected by extremely large or extremely small verdicts. The mean, or statistical average, takes the full range of jury awards (not including awards for the defense) into account. By reporting median and mean awards in constant 1984 dollars we can factor out the effect of inflation over the 25 year period. Median awards for product liability cases in San Francisco increased more than seven-fold, from $27,000 in the early 1960s to $200,000 in the early 1980s (in 1984 $). In Cook County, the increase was not so dramatic, going from $69,000 in the early 1960s to $187,000 in the early 1980s (in 1984 $). Similar sharp increases in median awards occurred in the professional malpractice area, but in other areas, such as suits arising out of auto accidents, the median remained stable or actually declined.

Mean awards, which are affected by a small number of very large verdicts, increased across the board in both jurisdictions over the 25 year period, even after the effects of inflation are taken into account. But the rate of increase in mean product liability awards was greater than for tort suits generally. The mean product liability award went from $51,000 in the early 1960s to $1,105,000 in the early 1980s in San Francisco and from $202,000 to $718,000 in Cook County.

The obvious inference from these data is that juries have become increasingly generous in their awards to plaintiffs in product liability suits. But there are a number of reasons to be cautious about drawing such an inference. First, there is some indication in the San Francisco data that the jury award average increased there, at least in part, because cases involving smaller amounts began to be filed in the lower court and in the court's arbitration program. Second, it is possible that attorneys in both jurisdictions have become increasingly willing to settle smaller value cases before trial. Without data on settled cases, which are not currently available, we cannot reject this possibility. Third, there may be changes in the nature of the injuries involved in cases going to trial, or changes in the nature of medical treatment, that we would expect to lead to increases in jury awards. Our previous analyses suggest that changes in injuries do *not* adequately explain the trend in verdicts that we have observed, but this issue should be subjected to further analysis.

Punitive Damage Awards

In both the jurisdictions we have studied, the number of punitive damage awards has increased substantially over the 25 year period. There were 49 punitive damage awards in San Francisco in the early 1980s, compared to 13 such awards in the early 1960s, and 65 in Cook County in the most recent period, compared to only 5 in the early 1960s. But almost all of the punitive damage awards occurred either in contractual disputes or intentional tort cases (mainly involving civil rights issues). Across the entire period, there were only 4 punitive damage awards in product liability cases in San Francisco and 3 such awards in Cook County. The percentage of product liability trials in which punitive damages were awarded increased over the period in both jurisdictions (from less than 1 percent through 1979 to 6 percent in 1980-84 in San Francisco and from 0 through 1979 to 1 percent in 1980-84 in Cook County) but because the absolute numbers are so small these percentage chanages are probably not meaningful. Punitive damage awards against business defendants were larger, on average, than awards against individuals, but such awards occurred most frequently in contract cases, not in personal injury cases. Punitive damage awards in contract cases were often far larger than compensatory awards, but in 75 percent of the personal injury trials in which punitive damages were awarded, the ratio of punitive to compensatory damages was 1.5 or less. Nevertheless there were a few product liability cases where punitive damage awards far outstripped compensatory damages.

Do Juries Apply Different Standards in Product Liability Suits?

Our multivariate analyses of the jury verdict data through 1979 suggest that juries may put a "premium" on product liability cases (Shanley and Peterson, 1983; Chin and Peterson, 1985). As reported above, over the 25 year interval, the average amounts awarded by juries increased more in product liability cases than in more routine types of personal injury suits. Some of the difference between product liability awards and other awards is explained by the fact that product cases more frequently involve serious injuries. But in both jurisdictions, juries awarded more to plaintiffs in professional malpractice, product liability cases and street hazard cases than to plaintiffs who had similar injuries but other causes of action. This tendency seemed to increase during the 1970s. In San Francisco, in the 1970s, a plaintiff in a product liability case received twice the amount received by a plaintiff with a similar injury from an accident on property. Juries also awarded more to plaintiffs who sued corporate defendants than to those who sued individuals. In Cook County, when plaintiffs sustained serious injuries, corporate defendants on average could expect to pay 2 1/2 times the amounts paid by individual defendants. Corporate defendants were also more likely to be found liable than individual defendants. The ICJ is currently conducting additional analyses that attempt to explain these differences, using new statistical techniques and the data base updated through 1984.

Trends in Expected Awards

Despite the constraints on our ability to explain *why* jury awards in product liability cases have changed, it seems incontrovertible that they have changed in these two major jurisdictions. Thus, insurers and product manufacturers operating in these jurisdictions have substantial reason to expect fewer victories and higher verdicts in product liability lawsuits that go to trial than were seen in the past. Expected awards (which take into account the chance of not having to pay anything, if the defendant wins, and the average amount awarded when the defendant loses) have increased twenty-fold in San Francisco since the 1960s (from $29,000 to $575,000 in 1984 $) and six-fold in Cook County over the same period (from $59,000 to $373,000). How these expected award values affect settlement values has not been subjected to empirical analysis, but most practitioners assume that higher expected awards lead to higher settlements.

TRANSACTION COSTS FOR PRODUCT LIABILITY CASES

How much does the tort litigation system cost? A recently completed ICJ study estimates that the total expenditure nationwide for tort litigation terminated in state and federal courts of general jurisdiction in 1985 was between $27 and $34 billion (Kakalik, 1986). These expenditures include compensation paid to plaintiffs, defendants' and plaintiffs' legal fees and expenses and the value of their time, insurance claims processing costs and the costs of operating the court system. Plaintiffs received about 46 percent of the total in net compensation.

Lawsuits arising out of automobile accidents, which accounted for about half of all tort filings in courts of general jurisdiction in 1985, accounted for about 43 percent of the total expenditures. The remaining 57 percent was spent on professional malpractice suits, product liability suits, and other forms of liability litigation. The data do not permit us to estimate the fraction of expenditures attributable to product liability alone.

Many practitioners believe that product liability and professional malpractice suits are more complex than the typical automobile accident suit and hence, more expensive to resolve. The ICJ data comparing transaction costs in automobile and non-automobile litigation seem to bear this out. Plaintiffs in automobile lawsuits terminated in 1985 recieved about 52 percent of total expenditures. Plaintiffs in non-automobile cases (which include product liability) received only 41 percent in net compensation. The difference in transaction costs between automobile and non-automobile litigation primarily reflects higher defense litigation costs for non- auto torts. Defense costs for non-auto claims have also been rising at a faster rate over the past five years, about 15 percent annually, compared to 6 percent annually for auto claims.

Because we cannot separate costs for product liability cases from the costs of other non-auto cases we do not know whether the 41 percent net compensation figure applies to product liability cases; transaction costs for these cases could be higher or lower than the average for all non-auto cases. But it should be noted that in an earlier study, the ICJ estimated that plaintiffs in asbestos litigation lawsuits -- which are a special class of product liability cases -- received 39 percent of expenditures in net compensation.

In sum, although we cannot perform precise calculations for product liability claims and lawsuits, the estimates reported here are consistent with the picture of increasingly costly product liability litigation that emerges from our earlier description of trends in jury verdicts.

CORPORATE RESPONSES TO PRODUCT LIABILITY LITIGATION

A key question for those considering changes in the product liability system is how the current system affects corporate behavior. Although much rhetorical attention has been devoted to the issue of the deterrent effects of the tort liability system, there is virtually no empirical analysis that would allow us to estimate the magnitude of these effects. Recent articles in the leading law reviews include some that argue for the likelihood of strong effects, and others that argue against this. But each side can only call on anecdotal evidence to support its position.

In 1982 the ICJ conducted a study directed at shedding some light on this issue (Eads and Reuter, 1983). The study involved interviews with corporate product safety officials in nine large manufacturing firms that were generally recognized as leaders in the safety field; it was intended to determine how innovative corporations had responded to changes in their environment. While those interviewed had much to say about the behavior of other firms, as well as their own, the study did not constitute a braoad survey of corporate behavior.

The researchers drew the following conclusions:[1]

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[1] The researchers also reviewed the results of two industry surveys conducted, respectively, by the Machinery and Allied Products Institute and the Conference Board, and two case studies of product safety activities in half a dozen companies.

> It is clear from thse interviews that, except for firms subject to the maximally intrusive regulation of such agencies as the Food and Drug and the Federal Aviation adminitrations, product liability is the most significant influence on product safety efforts. Product liability, however, conveys an indistinct signal. The long lags between the design decision and the final judgment on product liability claims (frequently five or more years), the inconsistent behavior of juries, and the rapid change in judicial doctrine in the area, all tended to muffle the signal.
>
> That is to say, firms learned little from the results of particular litigation about either specific design decision or the process of design decisionmaking. The frequency of suits and the level of awards provide some idea of the costs of failing to design a safe product and hence the level of effort that should be devoted to assuring a safe desing. Nevertheless, considerable uncertainty remains about the most appropriate method of assuring safety in product design.

The ICJ researchers found that firms' response to product safety pressures varied depending on the inherent seriousness of the safety problems faced by the firms (e.g., how hazardous the products manufactured were), the underlying organizations of the firm and the philosophy and management style of the CEO. Two of the firms the ICJ studied produced inherently hazardous products. According to the ICJ researchers, recognition of the hazardous nature of the products "permeated the[se] organization[s]," making it difficult to pin down the organizational response to product safety. Both of these firms had "experienced a substantial volume of product liability litigation," both "considered this an inevitable cost of producing the particular products they specialized in--not a sign of design or manufacturing failure," and both attempted to separate their porudct liability problems from their ongoing operating decisions. One firm treated product liability costs as an overhead expense, the other charged the costs to the product but only for pricing purposes. But "the fact that suits arose and judgments were paid out was not considered to inpugn the product or anyone connected with its development or manufacture."

Two of the firms the ICJ studied produced what the researchers termed low-hazard products. Both of these firms had extremely active product-safety programs, although the researchers questioned the effectivenss of one of these. The researchers attributed the concern about safety at both these firms to the "missionary" zeal of specific corporate officials, rather than to any concrete product liablilty experience.

In the remaining firms, said to manufcture moderately hazardous products, concern about and response to product safety issues were mixed. In some firms the response was primarily legalistic and defensive, in others it was more operational and emphasized hazard reduction.

SPECIAL PROBLEMS POSED BY MASS TOXIC TORT LITIGATION

Many observers of the civil justice system believe that tort cases arising out of mass exposure to toxic substances constitute a special category of product liability claims that warrant particular consideration in a review of the product liability system. Over the past few years, the ICJ has conducted a series of studies of asbestos personal injury litigation that highlight the special problems posed for the civil justice system by mass toxic torts. These studies have shown that:[2]

1. Asbestos cases pose a significant problem for the courts in which they are concentrated. In some courts, the number of pending asbestos claims consitute as much as 12 to 20 percent of the active civil caseload. Despite the considerable efforts and success of procedures for streamlining pretrial preparation, most of these courts have had serious problems disposing of cases. In a few jurisdictions with large asbestos caseloads, few or no cases are said to be ready for disposition. In those jurisdictions that have attempted to use traditional approaches to disposing of the cases, at the current rate of disposition, courts will not have disposed of their currrent caseloads until well into the next century. Regardless of disposition approach, most plaintiffs must wait a minimum of three years and as long as five or more years until their cases are resolved. Some plaintiffs may benefit from

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[2] The conclusions discussed here are drawn from Kakalik et al., 1983 and 1984; and Hensler et al., 1985.

such delays if their injuries become more evident as time elapses; others, however, may die before their cases are resolved.

2. The costs to litigate asbestos cases are higher than for any other kind of personal injury case for which transaction costs have been estimated. Through 1982, plaintiffs received on average 39 cents of every dollar expended for asbestos claims processing, while attorneys on both sides recevied most of the remainder. In all, about $1 billion was paid to compensate and litigate asbestos claims between 1970 and 1982.
3. The long time to resolution and high transaction costs are a consequence of the interaction between the special characteristics of asbestos cases--characteristics that they share with other mass toxic tort claims--and the substantive and procedural rules that govern the civil justice system. The latent nature of asbestos related diseases and the manufacturing context in which they occurred raise issues with regard to the timing of filing claims, determining causation, determining liability and apportioning damages that have been dealt with inconsistently, if at all, by the various state appellate courts and local trial courts. This has resulted in increased uncertainty with regard to case value, delays in case processing, increased transaction costs, and inconsistent outcomes. The large numbers of claims that arose within a relatively short period of time (in part because of decisions related to timing of claims filing) have made it difficult to process cases using traditional individualized procedures. But until recently lawyers on both sides and trial and appellate judges have rejected the use of such collective mechanisms as the class action and multidistricting as well as the use of collateral estoppel and other issue-preclusion devices for these cases. Instead, what has emerged is a patchwork of *ad hoc* procedures for grouping cases and establishing settlement formulae that have generally not been subject to public debate and may, in some situation, raise serious issues of conflict of

interest between the attorneys and their clients. The available alternative compensation systems, particularly the workers' compensation system, do not appear to have resolved the problems observed for the tort system regarding timing of clams, standards for proving causation and issues arising out of the involvement of multiple defendants.

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STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION

The American Insurance Association (AIA) is a trade association which is comprised of over 170 property/casualty insurance companies. The member companies of AIA provide the majority of the product liability coverage written throughout the United States.

Our association has long been committed to product liability reform and has in the past been supportive of a federal solution to the product liability problem. We have also been actively working on the state level to achieve the type of substantive reform that is necessary to restore predictability to the civil justice system.

As the Committee is aware, product liability rates have increased sharply during the last two years. They reflect the risks associated with the production and distribution of products. The number of federal product liability suits has increased by 750% since 1974. During the same period of time, the average jury verdict has increased from under $400,000 to over $1.8 million in product liability cases.

While there is a general trend towards increased product liability costs, it is important to note that there are over 400 distinct product liability lines and not all of them have been adversely affected by changes in our civil justice system. Some lines of business have remained stable while others, most notably those involving chemical, pharmaceutical, general aviation, and automobile manufacturers, have been disproportionately impacted and accordingly would benefit the most by substantive product liability reform.

Indeed, the increased exposure of these kinds of business to liability at every turn has resulted in higher liability insurance rates and has significantly reduced their ability to meet the challenges from international competitors who are not so burdened by court decisions in their countries. In some jurisdictions exposure remains high even though product manufacturers and sellers have done everything possible to avoid injury and have met or exceeded all legal and regulatory requirements.

While S.2760 seeks to redress the problems besetting product manufacturers and sellers, it falls woefully short of that goal. It also is flawed in that it contains a provision which would require insurers to report detailed information to the federal government. This information is already on file with state regulators and the effective result is that purchasers of product liability insurance will be asked to subsidize this information gathering activity. The insurance industry therefore cannot support this measure unless Title IV of the legislation is deleted.

AIA Comments on S.2760

AIA believes that the legislation positively addresses some of the problems which relate to the offset of workers' compensation benefits as well as standards of liability governing product sellers. With respect to the former we believe that the provision adopted in S. 2760 would leave claimants whole while significantly reducing transaction costs. We applaud, in particular, subsection (c) which prohibits third party suits by an employer or its insurer against the manufacturer or product seller defendant for workers' compensation payments that arise from a product liability claim.

We also believe that S.2760 would bring about substantial benefits for product sellers who in most circumstances would only be held liable for their own negligent actions. It would rectify an imbalance which exists in several jurisdictions whereby a claimant is successful in bringsing a suit against an innocent product seller despite the fact that it exercised every possible precaution that a reasonable person would have taken in the sale or distribution of the merchandise which gave rise to the claim.

Joint and Several Liability

Our next comment is addressed to the issue of joint and several liability. AIA believes that recent trends relating to the expansion of joint and several liability must be curtailed if stability is to be brought back to the insurance marketplace. In several court decisions applying this doctrine, defendants who are only partially responsible for an injury are nonetheless required to pay for all of the costs of compensation. This has made it extremely difficult for an insurer to assess the risk of the insured. Insurers providing coverage for a manufacturer might be underwriting not only the activities of their own insured but also others over whom they have no control and from whom no premium has been received.

Under an amendment which was introduced by Senator Pressler and adopted by the Senate Commerce Committee, the imposition of joint and several liability would be prohibited for pain and suffering awards and punitive damages. Each defendant would still remain jointly and severally liable for all forms of economic loss. While the Pressler amendment constituted an important improvement over the bill as originally drafted, it clearly does not go far enough as innocent parties could be required to shoulder responsibility for the acts of the true wrongdoer. There would exist be substantial uncertainty in assessing liability thereby making it difficult for insurers to assess their exposure on an individual contract. Accordingly, we strongly recommend that the legislation be strengthened by limiting the imposition of joint and several liability to only those instances where parties are acting in concert.

Fault Based Standards

AIA was very disappointed by the fact that S.2760 fails to articulate standards governing the conduct of product manufacturers. In our view, a return to fault-based standards is absolutely essential in order to restore order to the civil justice sytem. In recent years judges have moved increasingly toward a concept of absolute liability, holding defendants liable for all injuries related to their activity regardless of the forsseability of the injury by the defendant and regardless of whether the injury might reasonably have been avoided by the injured plaintiff. This runs counter to the traditional principles of tort law. It also has the unintended effect of encouraging wrongful behavior since under absolute liability those who have behaved properly are punished indiscriminately with those who have acted negligently.

AIA accordingly would seek changes to the legislation that would absolve a manufacturer from liability if the unsafe aspect of the product is an inherent characteristic of the product which would be recognized by an ordinary consumer. In addition, a manufacturer would not be liable for harm allegedly caused by a defective product if the harm was caused by an unavoidably unsafe aspect of the product.

The Association also believes that the Senate should adopt amendments to the bill which are being proposed by Senators Lugar and Kasten that would establish two fault-based defenses in product liability lawsuits. The first would preclude the imposition of liability if a product had been unreasonably or unforseeably used or altered. The second would prevent liability for design defects unless the defendant can prove that, at the time the product left the control of the manufacturer, a practical and technologically feasible alternative design was available.

These two amendments are essential improvements to the bill that would rectify the unfairness associated with holding manufacturers liable for the misuse of their products or for risks that could not have been known at the time it made those products. The latter provision is absolutely essential in areas such as chemical and pharmaceutical manufacturing where scientific changes take place at a very rapid pace. Concern that courts in the future will hold their actions in 1986 subject to the scientific standards of the year 2000 has thwarted new product development in the United States and has caused many product manufacturers to produce and market innovative products overseas rather than face the uncertainty of the U.S. civil justice system.

Data Reporting Provision

Our final comments are directed toward Title IV of the bill which would require product liability insurers, self insurers and captive insurers to report to the Secretary of Commerce "all data deemed necessary by the Secretary to fully present and analyze the impact of the Act on such insurers." The Association is steadfast in its opposition to this provision.

The insurance industry already compiles detailed information about product liability coverage for state regulators as well as state licensed statistical agencies. These data are broken down on the basis of product classifications and subclassifications and are made available to anyone who desires the same.

The information sought under Section 401 would have absolutely no effect on the availability or affordability of product liability insurance. It would, however, establish an unneeded and unwarranted costly bureaucracy at the Department of Commerce which would duplicate much of the work already being performed by state regulators. This view is not shared by insurers alone. Indeed the largest consumers of product liability insurance, including those represented by the National Association of Manufacturers and the Product Liability Alliance, have spoken out in opposition to this provision. Surely they as consumers of insurance would not do so if they felt there were any benefits to be gained by its adoption. Ostensibly, Section 401 was inserted in order to provide Congress with a better understanding on how S.2760 was affecting product liability rates and coverage. While AIA does not oppose an evaluation of the effectiveness of the Act, we believe that the approach advocated in Section 401 is poor public policy. Instead of vesting new authority at the Department of Commerce, Congress would be much better advised to secure the information it needs directly from state regulatory authorities as well as the National Center for State Courts and the Administrative Office of the U.S. Courts. With respect to information from state regulatory agencies, it should be noted that the President of the National Association of Insurance Commissioners, Josephine Driscoll, has indicated in a letter to Senator Danforth that her association is prepared to provide Congress with "the comprehensive data specific to the product liability line of insurance." In a period of fiscal austerity, it is the height of foolishness for the federal government to incur new expenses when its objectives can be satisfied at little or no cost.

Conclusion

S.2760 is an incomplete measure which, while containing some provisions that may assist in ameliorating the liability crisis, is nonetheless inadequate in redressing the imbalances which exist in the civil justice system. The American Insurance Association cannot support the measure in its current form. Title IV must be deleted and other sections of the bill relating to fault-based standards and defenses must be strengthened if the measure is to gain our enthusiastic support.

Respectfully submitted,

Peter A. Lefkin
Counsel

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State of California
Office of the Attorney General
John K. Van de Kamp
Attorney General

September 5, 1986

Hon. Strom Thurmond
Chairman, Senate Judiciary Committee
218 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

Re: S. 2760

I understand that the Judiciary Committee will be holding hearings September 9 and 10 on the products liability bill reported by the Committee on Commerce, Science and Transportation in June. I write to urge the committee to reject the bill.

I oppose any effort to preempt state tort law, which I view as a dangerous and unwarranted deviation from sound principles of federalism. Furthermore, I oppose S.2760 on the ground that it would deprive accident victims of their right to full compensation for their injuries.

Due Regard for Principles of Federalism

The federal government has long respected the right of each state to adopt its own tort laws, and for 200 years the economy has flourished amid diversity of laws among the fifty states. Indeed, the evolution of tort law is one of the great examples of the states' function as laboratories for the nurturing of legal innovation.

Our nation has seen the development of the automobile and the interstate highway system without the need for a federal law of liability for automobile accidents. Americans from every state board aircraft and traverse the fifty states each day without the need for a federal law to govern airplane crashes. Yet now we are told that the nation urgently needs a federal law to govern injuries caused by every item of commerce, from aspirin to acids, from zippers to zirconium. Must the risks created by the manufacturer of plastic toys marketed solely in one region of the country be governed by the same rules as the hazards created by the oil company that makes plastic sold in different regions? The logic of federal preemption of tort law is not compelling.

A businessman who finds one state's liability rules so burdensome that he doubts his ability to market his product profitably may forego that state's business. Managers have ample means to target markets and to avoid distribution where business is not promising. Their tools are not so meager that it is necessary for Congress to sweep aside 200 years of federalism.

In fact, the case for preemption is particularly weak in the area of tort law because the states have performed exceptionally well in balancing the competing needs for innovation and uniformity, as the law of product liability demonstrates. It is in some respects remarkable that, without federal intervention, the courts of the fifty states have evolved rules more noteworthy for their similarities than for their differences. In the Nineteenth Century the negligence test was elucidated and adopted by nearly every state. In the mid-Twentieth Century some of our leading courts identified the salutary effects of strict product liability, and that rule has been followed in virtually every jurisdiction.

Were there a need to narrow the range of liability rules, there are well-established institutions to meet that need. Model codes, the Restatements of Law, the various associations of state officials all provide ample opportunity for examination of the diversity of state laws and recommendation of proven approaches. Those dissatisfied with the laws of the fifty states can make their cases there, as well as before the courts and legislatures of the various states.

Of course, what is striking about preemption in this field is the fact that there is no wide divergence of state laws. I suspect that there is more consistency in the product liability laws of the fifty states than there is between the states and this bill. Let there be no mistake about the reasons for this bill. It does not seek to reconcile conflicting state laws at all, but to overrule the independent judgments of the courts and legislatures of the states, where the proponents of regressive changes in tort law have been singularly ineffective.

The Rights of Victims

Those who advocate federal preemption speak not so much about the need to unify disparate rules as about their claim that it is necessary, indeed vital to the American economy, that persons injured by defective goods be deprived of the rights they enjoy today to sue for full compensation for their injuries. And so you have before your committee this proposal to sharply limit recoveries, to impose upon victims the obligation to prove negligence, to shift to injured consumers a portion of the risk of some defendants being bankrupt or beyond suit, to limit punitive damages. The inevitable result of enactment of these measures would be to deprive some consumers seriously injured by a dangerously defective product any compensation and to reduce the recoveries of other consumers substantially below the extent of their injuries. This bill represents a giant step backward in the law.

The bill contains numerous restrictions on the rights of victims, restrictions I respectfully urge ought to be rejected. Let me address just one of those restrictions: the proposed limit on recoveries for noneconomic damages. Under S.2760 no victim could recover more than $250,000 in noneconomic damages.

What is the basis for such a proposal? Is it claimed that an accident victim never incurs more suffering than $250,000 worth? If so, the claim is specious on its face. Accident victims sometimes incur fairly minimal medical costs and no lost wages yet suffer terribly. Young people who lose the ability to have children, people who must live out their lives horribly disfigured, office workers who balance their sedentary employment with active recreational pastimes they lose forever because of an accident, intelligent people who suffer irreversible brain damage -- how can it be claimed that these "noneconomic damages" are never worth more than $250,000? Who among us would trade places with these victims for $250,000?

And that is precisely the question to be answered. The fundamental principle of Anglo-American civil jurisprudence is that damages are supposed to make a person whole, to place them in as good a position as they were in before they were injured. If a negligent driver destroys a new sports car, the law says the owner is entitled to enough money to replace that car. The owner might be able to buy a cheaper car that gives him or her the same functional value -- miles-per-gallon, seating capacity, and so on. But the law recognizes the right to the non-economic value of the car -- the aesthetics, the fun, the prestige. We should do no less for someone who loses a limb than for someone who loses a car.

It is sometimes pointed out that money can't replace a missing limb, lost vision, the comfort of a child or spouse. That is beside the point. If a defective appliance causes a fire that destroys a priceless Monet, we have no difficulty recognizing the victim's right to monetary payment, notwithstanding that it cannot bring back the lost painting. For the permanently injured too, we should not deny the victim the emotional compensation money can offer simply because they have lost so much more than mere dollars.

And, of course, a cap on damage awards affects only the most severely injured. To single them out to bear the burden of the insurance crisis is particularly cruel.

The Rights of Consumers Not to Become Victims

One must expect that the inevitable consequence of this bill would be to increase the number of accident victims.

Whenever a rational businessman is told that the likelihood of being held liable for the accidents his product causes has gone down, or that the cost of paying for accidents when he is held liable has dropped, it is only rational for that businessman to consider redirction of his investment in product safety. We are all familiar with the appalling stories of hard-nosed businessmen dropping a safety feature in a cold calculation that it made economic sense to cause the accidents and pay the damages.

The attack on punitive damages also illustrates the impropriety of imposing a federal statute in this area. While the insurance industry seeks to lay much of the blame for the insurance crisis on large punitive damage awards, in California, as in many of the states, punitive damages are by law uninsurable and hence unrelated to insurance costs. It would be wholly inappropriate to curtail punitive damages awards in all fifty states, including those where they have no effect on insurance, on the claim that it would help make insurance cheaper.

Dealing with the Insurance Crisis

Fueling this and the other federal and state bills is the claim that the tort system is out of control, that juries and judges have suddenly awarding vastly larger damages, that there is a litigation explosion endangering the economy. I have been examining these claims for some time and have come to the conclusion that the performance of the civil justice system is not primarily responsible for the current crisis of availability and affordability of insurance.

What the numbers show is that lawsuits are being filed in state courts (where over 95% of the cases are brought) at a per-capita rate that has not appreciably changed over the last decade; that plaintiffs and defendants continue to win about the same respective proportion of liability verdicts as they have in the past; and that the typical jury award has not changed much in real dollars.

While there has been growth in the mean jury award, that growth has been gradual, steady, and relatively modest in inflation-adjusted dollars. The trend has prevailed for well over a decade and cannot be at the root of the insurance crisis of the past two years. And the trend has been isolated among the most severely injured accident victims. In fact, many studies have found that historically the tort system overcompensated the slightly injured and undercompensated the most severely injured. Viewed in that light, the growth in mean verdicts appears to be no more than a correction of a longstanding aberration of the system and the imposition of caps on damages is a perverse response.

In examining the claims about the legal system, I have reviewed the operating record of the insurance industry in California across various insurance lines. That review showed that insurance pay-outs have grown in the liability-based lines no faster than they have grown in those lines unrelated to the tort system. Payments have grown particularly fast in worker's compensation insurance, a system touted for its caps on recoveries, sharp limits on contingent fees, no coverage for pain and suffering, and simplified administrative system. That suggests that whatever the causes of our insurance crisis may be, they lie outside the tort system and are not amenable to solutions that simply reduce compensation to those most severely injured.

I wish to emphasize that my comments on this bill does not reflect an indifference to the need for both insurance reform and tort reform. The legal system is too expensive, too cumbersome, and, at times, too unpredictable. That is often less a problem for defendants than it is for plaintiffs, whose recoveries are delayed and reduced by the tort system, but it is legitimately a problem for all of us who participate in the public debate. I am determined to see to it that California addresses these problems.

Nor do these comments imply a lack of appreciation for the constructive ideas contained in S.2760. I am especially interested in a balanced system for settling product-liability claims more quickly and economically without unfairly favoring either defendant or plaintiff. I hope to see our Legislature consider such proposals in their next session.

And ultimately that is precisely where tort reform and insurance reform should take place. The states have proven their ability to develop sensible, responsible rules for the allocation of the costs of accidents. There is simply no need for federal preemption.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

AMERICAN BAR ASSOCIATION

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PLEASE REPLY TO:
1800 M STREET, N. W.
WASHINGTON, D. C. 20036

August 11, 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

It is our understanding that your Committee has expressed interest in considering the proposed "Product Liability Reform Act" that was ordered reported June 26, 1986, from the Senate Committee on Commerce, Science and Transportation. We take this opportunity to tell you of our strong opposition to this bill or any other broad federal legislation pre-empting state product liability laws.

The American Bar Association opposes such legislation because it believes that the area of tort and insurance law is one which traditionally and appropriately has been handled at the state, not the national, level. Product liability laws have evolved historically from the common law developed by state courts and supplemented by state legislation. This gradual, state-by-state evolution of product liability law attests to one of the basic values inherent in our system of federalism, namely, that local communities in most situations are best able to regulate the day-to-day conduct of their citizens and are in the best position to address their specific social and economic needs.

Broad pre-emptive legislation such as the Commerce Committee proposal would introduce uncertainty and instability in the area of state product liability laws---results exactly contrary to the stated purpose of the proposed legislation. The current laws in each state have been carefully crafted and refined over the decades. In contrast, a new, untested system of laws would inevitably result in a rash of litigation in an effort to interpret it.

We have given serious consideration to "reform" proposals in the product liability area and have not taken a position of blanket opposition to all federal legislation in this area. We would support, for example, federal legislation dealing with occupational diseases with long latency periods, when the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce, and the number of such claims has become clearly an excessive burden on the judiciary. Similarly, we would support federal legislation allocating product liability risks between the federal government and its contractors and providing, in certain instances, indemnity against those risks. We are continuing to study this whole area to see if other portions of the product liability laws should be appropriately addressed at the federal level.

However, we cannot support legislation which would sweep aside the decades of careful legal drafting which has taken place in the fifty states in the product liability area and replace it with a sweeping new national standard. Such federal legislation may seriously impair the rights of those who have been injured and the consuming public generally by introducing great uncertainty and confusion into a judicial system that, with rare exception, has been working on the state level in a sound and rational way.

We urge you to vote against the Commerce Committee proposal when and if your Committee considers this bill.

Sincerely,

Wm W Falsgraf

William W. Falsgraf

WWF:saw
0516M

cc: Members of the Committee on the Judiciary

National Association of Independent Insurers
2600 RIVER ROAD, DES PLAINES, ILLINOIS 60018-3286
312/297-7800

Lowell R. Beck, President

September 15, 1986

The Honorable Strom Thurmond
Chairman
U. S. Senate Committee on Judiciary
SD-224, Dirksen Senate Office Bldg.
Washington, D. C. 20510

Re: Product Liability Hearing Record

Dear Chairman Thurmond:

The McCarran-Ferguson Act has been discussed on several occasions in connection with the Committee's consideration of product liability legislation. The purpose of this letter is to express our strong support of the McCarran Act and state regulation of insurance, as well as to state our opposition to any change in that regulatory system or in the McCarran Act.

Today, the insurance industry is intensely competitive in terms of pricing, products sold and customer service. Repeal of, or substantial changes in, the McCarran-Ferguson Act would not be beneficial to consumers but could instead be harmful to competition and to state regulation for solvency.

The McCarran-Ferguson Act is a federal law recognizing a long-standing commitment to a system of state (rather than federal) regulation of the insurance business. McCarran provides insurance companies with a limited exemption from federal antitrust laws (i.e., Sherman, Clayton and FTC Acts), if they are so regulated by the states. (Federal laws prohibiting boycotts, coercion or intimidation still apply, however, as do general federal corporate laws dealing with taxes, labor relations, pension plans, and so forth.) States, therefore, police insurance pricing practices and provide consumer protection regulation generally.

The limited antitrust exemption provided by the McCarran Act is essential to a healthy, competitive insurance market. The exemption permits joint collection and sharing of loss data and other essential information so that companies can make intelligent predictive judgments about possible future losses, adequately price insurance products and maintain realistic reserves to protect company solvency for policyholders. The exemption also permits reinsurance and pooling agreements vital to the efficient operation of the insurance market.

Elimination, or substantial modification of, the McCarran Act to prohibit or hamper the joint collection and sharing of essential industry data, or the reinsuring or pooling of risks, would cause chaos in the insurance industry. All but the very largest companies would find it impossible to compete because they could not accurately forecast the appropriate price for the product or participate in the market efficiently. The result would no doubt be a wave of mergers, with some companies opting to get out of the business altogether, thus lessening competition to the detriment of consumers.

State regulation of insurance has served consumers' interests for more than 40 years. The industry is highly competitive, as studies by the Department of Justice and the Federal Trade Commission show. At the same time, consumers' interests in prompt and fair handling of claims, along with regulation for solvency, are efficiently carried out by insurance regulators closest to the consumers being served--at the state level.

Problems with the tort system are the chief reason for today's "liability crisis." Changes are needed in our legal system to bring back predictability and stability. As it stands now, the tort liability system is out of control. Insurers are losing the ability, particularly in many commercial lines, to adequately predict the future loss costs for the products they sell today. The impact has been devastating to business and consumers, particularly smaller concerns.

The insurance industry is working very hard with the business community, and others, in state coalitions seeking to correct this situation through tort reform. In addition, we are working with insurance regulators and the business community to resolve specific problems in troubled lines through market assistance plans, voluntary pools and other programs. Progress is being made, but much work remains to be done.

We appreciate this opportunity to express our views in support of the McCarran Act and state regulation of insurance.

Sincerely,

Lowell Beck

Lowell Beck
President

STATE OF ILLINOIS
OFFICE OF THE GOVERNOR
SPRINGFIELD 62706

JAMES R. THOMPSON
GOVERNOR

September 16, 1986

The Honorable Strom Thurmond
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

Thank you for the invitation to testify before the Senate Judiciary Committee on product liability legislation.

Although I was unable to testify in person due to a scheduling conflict, I would appreciate it if the enclosed testimony could be included in the record.

I am a strong proponent of states' rights and believe the liability insurance crisis is best handled at the state level with the one exception of product liability. The only way to introduce predictability into a product liability system that varies from state to state is for the Congress to pass a set of uniform standards.

Again, thank you for the invitation to testify and I hope that you will call on me again should another opportunity arise.

Sincerely,

James R. Thom

James R. Thompson
GOVERNOR

Enclosure

TESTIMONY ON PRODUCT LIABILITY (S. 2760)
99th CONGRESS, 2nd SESSION
BY
GOVERNOR JAMES R. THOMPSON

At the August meeting of the National Governors' Association, a resolution that I sponsored--along with Governor DiPrete of Rhode Island--urging Congress to adopt a federal uniform product liability code was approved unanimously. This represents a total reversal in policy for the nation's Governors. While it was not an easy decision for many Governors to support uniform product liability, I think they realize that the recent insurance crisis made it imperative that some action be taken to remove the labyrinth of individual state laws that hurt not only manufacturers but also cost-conscious consumers.

The new resolution found that the present system "causes inflated prices for our consumer goods, the discontinuation of necessary product lines, and adversely affects the international competitiveness of the U.S. Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce."

The 2,000 plus delegates to the White House Conference on Small Business made the liability question its number one recommendation at their meeting in August. And before the NGA adopted a policy calling for a uniform product liability code, the Council of Great Lakes Governors, the Western Governors' Association, and the Southern Governors' Association all passed similar positions.

The current liability insurance crisis facing the nation has become a top priority for most Governors. This crisis has escalated to the point that it now affects all consumers through higher prices and taxes, and impacts in a dramatically adverse way the competitiveness of U.S. businesses. Legislatures are responding to this crisis in nearly every state, including Illinois. However, the area of product liability is one I believe must be addressed at the federal level.

No matter what the de jure power of the states, product liability is an area in which de facto we are virtually without power, regardless of the status of federal law. Manufacturers do not manufacture products to be sold in just one state and, even if they did, there would be no assurance that the product would always be used there. Because of this mobility factor, product liability insurance rates for an Illinois manufacturer are of necessity determined by experience factors in all fifty states.

The skyrocketing size and number of product liability suits has placed a costly, time-consuming, and cumbersome burden on our judicial system and those consumers who deserve compensation. A uniform product liability code would promote prompt resolution of lawsuits and virtually eliminate the troublesome and costly variations from state to state. This would reduce the cost and time of all parties involved. It would help consumers better know their legal rights and product manufacturers their legal obligations. And it would ensure a speedy and reliable system of recovery for injured parties.

The effort to adopt a uniform product liability code is not intended to shift the responsibility for solving the insurance crisis from the states to Congress. On the contrary, the adoption of such a code is the only area that appears to be beyond the purview of state legislative activity. Other changes in the civil justice system must be achieved at the state level.

I urge the Senate to support the passage of a uniform product liability code in the 99th Congress.

UNIVERSITY OF VIRGINIA
CHARLOTTESVILLE · VIRGINIA · 22901
SCHOOL OF LAW

September 9, 1986

Senator Mitch McConnell
708 Hart Office Building
Washington, D. C. 20510

Dear Senator McConnell:

In connection with your work on tort reform, I have been impressed with your insight that it may be a mistake to confine reform proposals to product liability.

In this connection, I suggest means whereby, without unduly violating considerations of states rights, the Federal Product Liability Bill, S.2760 could be transformed along lines consistent with your insight. (Senator Danforth's own commendable insight, which is at the heart of S.2760, does not curb plaintiffs' rights in tort law not across the board, but rather, for example, limits on pain and suffering will only be mandated when defendants have earned such lessening of plaintiffs' rights by guaranteeing prompt payment of victims' economic losses, which offer has been turned down by an injured party.)

My suggestion is as follows:

Keep S.2760 as it is, but add to it similar provisions from H.R.3084 (drafted in part by myself) and introduced by Representatives Henson Moore and Richard Gephardt, dealing with medical malpractice, plus possibly adding a third element dealing with governmental liabilty. H.R.3084, like S.2760, would encourage tender of net economic loss (without requiring it) but would be model state legislation which, however, lacking state action, would ultimately become applicable to federally funded health recipients (those under Medicare, Medicaid, CHAMPUS, Veterans Administration). The same could be done for governmental liability at the federal, state and local level, with the bill providing model state legislation but which, like the medical malpractice provision, lacking state action would, nonetheless, become applicable to claims for personal injury against the federal government. (If U. S. Department of Justice opposition to such a governmental liability provision proves too great an obstacle, the model state bill for local and state government could remain just that.)

Can I request that this letter be made part of the hearings on S.2760 before the Judiciary Committee?

I enclose some biographical material on myself. I would be glad to discuss this with you or your staff, assuming it is of interest.

Cordially,

Jeffrey O'Connell
John Allan Love Professor
of Law

JOC:kh

cc: Lawrence Herman, Esq.

BIOGRAPHICAL MATERIAL ON JEFFREY O'CONNELL

Jeffrey O'Connell, John Allan Love Professor of Law at the University of Virginia, specializing in accident and insurance law, is the co-author of the principal work which proposed no-fault auto insurance. From 1964-1979 he taught law at the University of Illinois at Champaign-Urbana.

Born in 1928 and a native of Worcester, Massachusetts, he is a graduate of Phillips Exeter Academy (1947), Dartmouth College (Phi Beta Kappa) (1951), and the Harvard Law School (1954). During law school he taught speech at Tufts University and, while serving as First Lieutenant in the U.S. Air Force in Japan, for the University of Maryland Overseas Extension Division. He also has taught law at the University of Iowa, Northwestern, the University of Michigan, Southern Methodist University, the University of Texas at Austin, and the University of Washington (Seattle). During 1973, O'Connell, a recipient of a Guggenheim Fellowship, taught a course in personal injury law at Oxford University, England. He was also a recipient of a second Guggenheim Fellowship for 1979-1980.

Prior to teaching law, he practiced law in Boston, Massachusetts, as a trial lawyer. He is a member of the Virginia, Massachusetts and Connecticut Bars, as well as an honorary member of the Arkansas and Minnesota Bars.

O'Connell is the author or co-author of eleven books since 1966 dealing with accident law. With Arthur Myers, a newspaperman formerly on the Washington Post, he was the co-author of a book published in 1966 by Random House entitled "Safety Last: An Indictment of the Auto Industry." With Professor Robert E. Keeton of the Harvard Law School, O'Connell was the co-author of "Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance," also published in 1966, by Little, Brown, Inc. The book is generally credited with leading to no-fault auto insurance. O'Connell and Keeton were also co-authors of "After Cars Crash: The Need for Legal and Insurance Reform," published in 1967 by Dow Jones-Irwin. Also, with Professor Keeton, he contributed to and edited "Crisis in Car Insurance" (Keeton, O'Connell & McCord, editors), published in 1968 by the University of Illinois Press.

In 1970, O'Connell wrote, as a co-author with Professor Wallace Wilson, a University of Illinois economist, "Car Insurance and Consumer Desires," also published by the University of Illinois Press. In 1971, he wrote "The Injury Industry: And the Remedy of No-Fault Insurance," describing the auto insurance controversy for both the general reader and the specialist. The publishers were Commerce Clearing House in hardback and University of Illinois Press in paperback, plus a special paperback edition published by Consumers Union. In 1971 O'Connell wrote with University of Illinois Sociologist and Law Professor, Rita James Simon, "Payment for Pain & Suffering: Who Wants What, When & Why?," published by Insuror's Press of Santa Monica, California.

O'Connell's book, entitled "Ending Insult to Injury: No-Fault Insurance for Products and Services," published in 1975 by the University of Illinois Press, presented a plan for extending no-fault insurance to many different kinds of accidents in addition to auto accidents, including those stemming from medical malpractice, malfunctioning products, slips and falls, etc.

Also in 1975, O'Connell's legal casebook for law students, written and edited with Professor Roger Henderson of the University of Arizona Law School, "Tort Law, No-Fault and Beyond: Materials on Compensation for Accidents and Ailments in Modern Society" was published by Matthew Bender, Inc.

O'Connell published in 1979 "The Lawsuit Lottery: Only the Lawyers Win (The Free Press, a Division of Macmillan Publishers). It describes the fascination and frustration of personal injury lititgation, along with further proposals for no-fault reforms.

In 1986, O'Connell and co-author C. Brian Kelly, a former journalist on the Washington Star and currently on the English faculty of The University of Virginia, wrote "The Blame Game: Injuries, Insurance and Injustice," published by Lexington Books, further indicting the tort system and proposing reforms.

O'Connell has also written extensively on various aspects of insurance law for numerous popular, legal and insurance journals, including The New York Times, The Wall Street Journal, and The Harvard Law Review. He has also lectured on these subjects throughout the United States and the world, including Belgium, Canada, France, Great Britain, Ireland, Israel, The Netherlands, Sweden and Yugoslavia. From 1967-1970 he held an appointment from the President of the United States as a member of the National Highway Safety Advisory Committee to the U.S. Department of Transportation. In 1981-82 he served as an appointee from the American Law Institute to the National Study Group on the Adequacy of Legal Remedies for Harm Caused by Release of Hazardous Substances, which group was formed pursuant to a mandate in the Toxic Wastes (Superfund) Act of the U.S. Congress and which group issued its Final Report in 1982. He was from 1970-1976 a member of the Board of Directors of Consumers Union, publisher of Consumer Reports. He has served since 1973 on the Educational Advisory Board of the John Simon Guggenheim Memorial Foundation, grantor of Guggenheim Fellowships, and since 1985 on the Medical and Safety Committee of the National Collegiate Athletic Association (NCAA).

He is married to the former Virginia A. Kearns of New York City; they have a son and daughter.

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